IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI J.A., MWAMBEGELE J.A., And LEVIRA J.A.)

CRIMINAL APPEAL NO. 13 OF 2018

LIVINUS UZO CHIME AJANA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Matogoio, J.)

dated the 24th day of August, 2017

in

HC Criminal Sessions Case No. 27 of 2015

JUDGMENT OF THE COURT

17th July & 7th August, 2020

MWANGESI J.A.:

Livinus Uzo Chime Ajana, the appellant herein stood indicted in the High Court of Tanzania at Dar es Salaam, for trial with and was convicted of the offence of trafficking in Narcotic Drugs contrary to the provisions of section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E. 2002 **(the Drugs Act)**. Subsequently, he was sentenced to go to jail for a period of thirty-two years. Additionally, he was ordered to

pay a fine of TZS 96,564,000/= being three times the market value of the drugs the subject of the charge.

The brief facts of the case leading to the arraignment and conviction of the appellant went thus; the appellant is a Nigerian by nationality and during his arrest, he had visited Tanzania. On the 3rd day of March, 2011 at around 13:30 hours, he was at Julius Nyerere International Airport (JNIA) where he appeared at the departure lounge screening machine for checking-in with a view of boarding Kenya airways enroute to Nigeria via Kenya. At the same, his bag was suspected by the security officers to contain suspicious substances. Police officers dealing with drugs at the airport were alerted and a search was made to the bag. Therein, 38 pellets of substance suspected to be narcotic drugs were recovered.

Being suspected to have swallowed some of the substances, the appellant was put under observation in a special room there at the airport. In the course of his observation, he excreted 16 pellets through the rectum at three intervals. The first excretion was made on the 5th March, 2011 at 05:30 hours, when five pellets were excreted. The second excretion was made on the same date at about 19:00 hours whereby five pellets were excreted. The final excretion was made on same date at about 21:50

hours, when he defecated 6 pellets and thereby, making a total of 16 pellets which were excreted by the appellant at the airport.

All what transpired in the course of the excretion was witnessed by Police officers from the Anti-Drugs Unit (ADU) and other officers from the Immigration and TRA. A form containing the personal particulars of the appellant and the number of pellets which he excreted and time, was filled and signed by the appellant and those who witnessed the incident (exhibit P6). The pellets recovered from the bag of the appellant and those which had been excreted, were sent to the Chief Government Chemist for analysis. According to the results as contained in exhibit P2, all the pellets were said to be narcotic drugs and hence, the appellant was accordingly charged.

In his defence, the appellant who admitted to be a Nigerian and told the Court that he came here in Tanzania to do hotel business which during his arrest, had not yet taken off. On the date when he got arrested at the airport, the appellant claimed to have been seeing off a friend who was travelling back to Nigeria. He strongly resisted any involvement with the narcotic drugs which he stood charged with.

In its endeavour to establish the commission of the offence by the appellant, the prosecution paraded 14 witnesses namely; Ernest Lujuo Joseph (PW1), Bertha Fredrick Mamuya (PW2), Neema Andrew Mwakagenda (PW3), Benedict George Nakenya (PW4), E. 5478 Detective Corporal Julius (PW5), Christopher Joseph Shekiondo (PW6), D. 7262 Detective Station Sergeant Mashaka (PW7), Christopher Mlemeta (PW8), Amina Mwinjuma Hemed Shoko (PW9), Assistant Inspector Alex Aggrey Mwasyeba (PW10), Alexander Nicodemus Kimuhe (PW11), Assistant Inspector Wamba (PW12), Inspector Monica Mwanache (PW13) and Browm Amin Mndeme (PW14).

The prosecution also tendered ten exhibits to supplement the direct oral testimonies of the witnesses which included; 54 pellets (P1 collectively), report dated the 18/3/2011 (P2), a leather bag black in colour (P3), a Police Loss Report in regard to an air ticket of Kenya Airways with No. 706248277/195 (P4), photocopy of the passport of one Livinus Chime Ajana (P5), an observation form (P6), a photocopy of Kenya Airways ticket (P7), certificate of value of narcotic drugs and psychotropic substance (P8), cautioned statement of the appellant (P9) and a statement of Abasi

Mingole (P10). On his part, the appellant relied on his lonely sworn testimony in defending himself.

As alluded above, the learned Judge who presided over the matter being aided by assessors, after analyzing the evidence which was placed before him, did not buy the defence advanced by the appellant. He was convinced that the case had been established beyond reasonable doubt. He therefore convicted the appellant as charged and sentenced him to serve a jail term of 32 years. Moreover, he was ordered to pay a fine of TZS 96,564,000/= being three times the market value of the narcotic drugs the subject of the charge.

The appellant felt aggrieved by both the conviction and the sentences which were meted out to him. On the 18th day of December, 2018 he lodged a seven-ground memorandum of appeal challenging the finding of the trial Judge. They read: -

1. *That, the learned trial Judge erred in law and fact when he convicted the appellant based on exhibit P1 tendered by PW1 who was incompetent witness to tender the same.*

2. *That, the learned trial Judge erred in law and fact when he believed that 38 pellets were seized from the appellant while the seizure note, socks or shoes where the pellets were allegedly wrapped, packed and put in exhibit P3 was not tendered before the Court to satisfy itself beyond reasonable doubts.*
3. *That, the learned trial Judge erred in law and fact to convict the appellant based on evidence of PW14 and exhibit P10 (statement of Abasi Mingole), while the statement was admitted contrary to the mandatory provisions of the Tanzania Evidence Act Cap 6 R.E. 2002.*
4. *That, the learned trial Judge erred in law and fact to admit exhibit P9 (cautioned statement of the appellant) that was recorded contrary to the mandatory provisions of the CPA Cap 20 R.E. 2002 and without giving an opportunity to the appellant to comment on it before being tendered.*
5. *That, the learned trial Judge erred in law and fact when he admitted secondary evidence (exhibits P5, P6 and P7) believing that originals were lost without sworn/affirmed affidavit from the exhibit keeper (PW3) and without prior notice during trial.*

6. *That, the learned trial Judge erred in law and fact to believe evidence of PW4, PW7, PW8 and PW10 who failed to exactly identify the pellets they witnessed at the scene of crime during the trial because they were not labelled at the scene of crime contrary to the PGO No. 229.*
7. *That, the learned trial Judge erred in law and fact when he convicted the appellant in a case that was not proved beyond reasonable doubts as required by the law.*

On the 1st day of August, 2019 the appellant lodged yet other six grounds of appeal comprised in a supplementary memorandum of appeal bearing the following wording, that is: -

1. *That, the learned trial Judge erred in law to accord due weight to exhibit P1 and convict the appellant based on PW1's evidence who failed to lay foundation as to where from and when the exhibit P1 landed into his hands on the tendering date and even the appeal record is silent about it.*
2. *That, the learned trial Judge erred in law and fact to convict the appellant believing on PW6's evidence that he prepared exhibit P8 pursuant to powers conferred and vested upon him under section*

27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act No. 9 of 1995 while the same section does not give him such powers as alleged.

3. *That, the learned trial Judge erred in law and fact to convict the appellant based on PW2's evidence who tendered exhibit P2 that was incomplete for being not attached with original printout from the confirmatory machine. Hence it was unreliable for convicting the appellant.*
4. *That, the learned trial Judge erred in law and fact to convict the appellant believing on exhibit P2 that revealed cocaine hydrochloride which is poison listed in the First schedule of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E. 2002 while in fact the same is not featured in the illegal list.*
5. *That, the learned trial Judge erred in law and fact to believe the weight (804.70 gm) of exhibit P1 while it was not realistically determined by only taking two pellets to get average weight of all 54 pellets.*
6. *That, the learned trial Judge erred in law and fact to convict the appellant without considering that the trial was unfairly conducted*

without defence advocate during preliminary hearing and the interpreter was not sworn that he will translate truly and fairly.

In addition to the foregoing grounds of appeal lodged by the appellant, when Mr. Jeremia Mtobesya learned counsel, was engaged by the appellant to represent him in this appeal, on the 6th day of July, 2020 he lodged a supplementary memorandum of appeal comprising one ground and thereby, constituting a third set of the memoranda of appeal. The same reads: -

1. *That, the trial Judge erred in law to try, convict and sentence the appellant basing on an incurably defective information which;*
   (a) Was suffering from duplicity, and
   (b) Did not contain sufficient information as regards to the particulars of the offence to enable the appellant to understand the charges and properly defend himself.

On the date when the appeal was called on for hearing before us, the appellant was represented by Mr. Jeremia Mtobesya, learned counsel, whereas the respondent had the joint services of Ms. Veronica Matikila

learned Senior State Attorney and Ms. Clara Charwe, also learned State Attorney.

Prior to arguing the grounds of appeal, Mr. Mtobesya extracted seven grounds of appeal from the three sets of the memoranda of appeal which had been lodged in Court. The first ground comprised of the first limb of first ground in the supplementary memorandum of appeal which was lodged by him and dropped the remaining limb. Then he adopted the second, third and fourth grounds of appeal in the way they appear in the memorandum of appeal which was lodged by the appellant together with their serial numbers. The fifth ground in the memorandum of appeal lodged by the appellant, was dropped and thereby, making the sixth ground to read the fifth ground. Finally, the learned counsel adopted grounds number three and five in the supplementary memorandum of appeal which was lodged by the appellant, and made them to read the sixth and seventh grounds respectively. The remaining fourth and sixth grounds in the supplementary memorandum of appeal which was lodged by the appellant, were dropped as well.

Expounding the first ground which he started to argue, Mr. Mtobesya submitted that the information which was read over to the appellant on the

15th day of June, 2016 suffered from duplicity. Basing his submission on the provisions of section 2 of **the Drugs Act** which defines the offence of Trafficking in drugs, he argued that each act which has been mentioned in the defining section refers to one offence. Since the particulars of the offence in the appeal at hand did not clarify the type of trafficking which the appellant was alleged to have committed, he argued that it was duplex and hence prejudiced him from preparing well his defence. To concretize his argument Mr. Mtobesya, referred us to the decisions in **Ahamad Mussa Mtimba Vs Republic** [1988] TLR 268 and **Erasimu Daud Vs Republic** [1993] TLR 102.

In the second ground of appeal, the learned counsel for the appellant challenged the finding of the trial Judge, that exhibit P1 had been retrieved from the appellant. In clarification he argued that one, the integrity of the 38 pellets of drugs alleged to have been found in the bag of the appellant was questionable on account that, the socks and shoes from where they were allegedly wrapped were not tendered in evidence. Furthermore, there was no certificate of seizure tendered to establish that they were indeed found in possession of the appellant. Two, the remaining 16 pellets alleged

to have been excreted by the appellant while under observation at the airport, were not identified in court.

The trial Judge was further criticized in the third ground of appeal, for according weight to the statement which was given by one Abasi Mingole (deceased) and tendered as exhibit P10 under the provisions of section 34B of the Evidence Act, Cap 6 R.E. 2002 (**the TEA)**. The basis of criticism was founded on the way the statement was recorded. Mr. Mtobesya, submitted that for a statement made by a person who cannot be called to give direct oral evidence in court to be admitted in evidence, it has to cumulatively meet the requirements which have been listed in section 34B (2) of **the TEA**. In exhibit P10, this requirement was not met because the declaration purported to have been made by the maker, was made before he gave it which infringed the law. Reference was made to the decision in **Elias Melami Kivuyo Vs Republic,** Criminal Appeal No. 40 of 2014 (unreported), which he urged us to follow suit and discount the evidence from exhibit P10.

The gist of the fourth ground of appeal is the cautioned statement alleged to have been given by the appellant which was tendered as exhibit P9. After the appellant had disowned his signature, the implication

according to Mr. Mtobesya, was that there was no voluntariness in giving it. Under such situation, the trial Judge was at error in relying on the statement by the counsel that the cautioned statement could be admitted, instead of inquiring from the appellant if he had any objection. To buttress this stance, the decision in **Abubakar Hamisi and Another Vs Republic,** Criminal Appeal No. 153 of2012 (unreported) was cited. He thus asked us to sustain this ground.

For the fifth ground of appeal, the complaint is pegged on the testimonies of PW4, PW7, PW8 and PW10 whose testimonies centered on the 16 pellets of drugs alleged to have been excreted by the appellant while under observation at JNIA. The said pellets were recorded in a form which was signed by the witnesses as well as the appellant and thereafter mixed with those which had previously been retrieved in the appellant's bag. The challenge by Mr. Mtobesya was to the effect that the witnesses failed to identify them out of the 54 pellets contained in exhibit P1.

The learned counsel submitted further that, the failure by the prosecution witnesses to identify the 16 pellets was attributed by the prosecution's failure to observe the requirements under the Police General Orders No. 229 **(the PGO**), of which in terms of paragraph 8, they had to

be labeled at the scene of crime. Since PW4, PW7, PW8 and PW10 failed to identify in court the pellets allegedly excreted by the appellant at JNIA, he requested us to doubt the integrity of their testimonies relying on the decision in **Alberto Mendes Vs Republic,** Criminal Appeal No. 473 of 2017 (unreported).

In the sixth ground of appeal, the Court was urged by Mr. Mtobesya to doubt the accuracy of the report which was tendered as exhibit P2, which purported to be the analysis of the narcotic drugs contained in the pellets which were admitted as exhibit P1. He contended that the purported report was not a report so to speak because it was a mere correspondence letter. In his view, a proper report ought to have been accompanied with the original printout from the confirmatory machine confirming that what had been analyzed was indeed narcotic drugs. In the absence of such printout, Mr. Mtobesya invited us to doubt the oral testimony by PW2 that what she analyzed was narcotic drugs, because it was inadequate. On that basis, we were asked to sustain this ground.

The weight of the narcotic drugs alleged to have been trafficked by the appellant, constituted the seventh ground of appeal. According to the testimony of PW2, the total weight of the 54 pellets which were tendered

as exhibit P1 was 804.70 grams. Mr. Mtobesya, challenged this said weight arguing that, the mode which was applied of using a sample of only two pellets, did leave the weight of the said narcotic drugs questionable and invited us to find so. In conclusion, the learned counsel requested us to find merit in the appeal, which he asked us to allow and set the appellant at liberty.

In response to the submission by her learned friend, Ms. Matikila declared her stance from the outset that she was resisting the appeal. Responding to the first ground, she argued that there was no question of duplicity of the information which was preferred against the appellant and that the contention by her learned friend that each act mentioned in the defining section referred to a separate charge was a misconception. In her submission, the acts mentioned in the defining section were in respect of the methods of committing the offence of trafficking in drugs and nothing else. A charge could only be said to be duplex where two distinct offences have been lumped in one count, she concluded referring us to the holding in **the Director of Public Prosecutions Vs Morgan Maliki and Another,** Criminal Appeal No. 133 of 2013 (unreported). To that end, we were urged to dismiss this ground.

The learned Senior State Attorney then skipped the second ground which she argued later jointly with the fifth ground, and moved to the third ground where the complaint is that exhibit P10 was admitted without compliance with the requirement of section 34B of **the TEA.** She acknowledged the interpretation which was given by the Court in **Elias Milami Kivuyo's** case (supra), that the declaration has to be made after the statement has been made. She however argued that, the change of location of the declaration of the maker as it was the case here of putting it before the statement was given was not fatal. She implored us to find the anomaly was curable under the provision of section 388 of the Criminal Procedure Act, Cap 20 R.E 2019 (**the CPA**) and hold that it was properly recorded and admitted.

The response of the learned Senior State Attorney to the fourth ground which challenged the admission of the cautioned statement of the appellant without asking him if he had any objection or not, was that the need did not arise because the appellant was fully represented by a counsel. Ms. Matikila argued further that, before the admission of exhibit P9 could be made, the Court adjourned the proceedings for about half an hour to enable the appellant and his counsel discuss as to whether it had

to be admitted or not. The answer which was ultimately given by the counsel, was that the statement had been voluntarily given save the signature, which was disputed. Alternatively, it was the position of Ms. Matikila that, even if the evidence of the cautioned statement was to be expunged, still there was ample evidence to sufficiently implicate the appellant to the charged offence. All in all, she asked the Court to dismiss the fourth ground of appeal.

On the challenge of accuracy of the analysis which was made by PW2 in exhibit P2, which constitutes the sixth ground of appeal, Ms. Matikila's submission was that it was unfounded. She argued that there was no requirement of any law prescribing the mode of preparing a report by an expert witness or explaining as to how he/she has reached at a certain finding. She added that it was on that basis that, her learned friend failed to cite any law which had been infringed. Placing reliance on the holding in **Marceline Koivogui Vs the Republic,** Criminal Appeal No. 469 of 2017 (unreported), she invited us to find the analysis in exhibit P2 to have correctly been acted upon by the trial Court and dismiss the complaint.

With regard to ground number seven, wherein the complaint by her learned friend is about the weight of the narcotic drugs alleged to have

been trafficked by the appellant, Ms. Matikila referred us on page 48 of the record of appeal, where PW2 told the Court the procedure which she applied in calculating the weight of narcotic drugs which were taken to her for analysis. She said that she used the standard procedure which was introduced by the United Nations known as 'the standard operative procedure' whereby calculation is made by sampling that is, weighing few pellets and then using such weight to calculate the weight of the remaining pellets.

Finally, the learned Senior State Attorney, responded conjointly grounds No. 2 and 5 because they are both about seizure and identification of the pellets allegedly trafficked by the appellant. Starting with the complaint that there was no certificate of seizure which was tendered in Court, Ms. Matikila submitted that the circumstances in the instant appeal, was an emergency matter which did not fall under the procedure stipulated under section 38 of **the CPA** but under section 42 of the same Act, where a search order and certificate of seizure, are uncalled for. The holding in **Marceline Koiyogui's** case (supra), was cited in reliance.

On the complaint that the prosecution failed to tender in evidence the socks and shoes wherein the pellets of drugs allegedly trafficked by the

appellant had been wrapped, the learned Senior State Attorney's answer was that, the need to tender them as exhibits in Court did not arise because they could not have added any evidential value to the case.

In regard to the argument by her learned friend that the pellets alleged to have been excreted by the appellant while under observation at the airport were not identified, Ms. Matikila submitted that, there was no question of distinguishing the pellets recovered in the bag of the appellant and those which were excreted, because all pellets were alike in every aspect and had been seized in the same process. According to her, identification of the pellets in the instant appeal, had to be appreciated by the chain of custody. This was so because neither the 38 pellets of narcotic drugs retrieved from the appellant's bag at JNIA, nor the 16 pellets which were excreted by the appellant while under observation at the airport, had its chain of custody broken.

Discussing on the argument by her learned friend, that the identification of the pellets became impossible because the pellets were not labeled at the scene of crime after being excreted by the appellant, Ms. Matikila made reference to paragraph 8 of **the PGO** 229, which tasks the investigator of the case with the duty to label exhibits. Under the

circumstances, the pellets could not be labeled immediately after being excreted by the appellant because there was no investigator at the airport. Pursuant to the named procedure, the pellets were labeled at the office of ADU by PW3, which was after had been its case number.

Reacting on the holding of the Court in **Alberto Mendes's** case which was relied upon by her learned friend in his submission, Ms. Matikila argued that the circumstances in the said case were distinguishable from the ones in the instant case in that, in the earlier case there were material contradictions between the direct oral testimonies of the witnesses in Court and the statements which they had given at the Police Station, which is not the case here. We were therefore requested to find no merit in this argument of her learned friend and dismiss this ground of appeal. She concluded her submission by urging us to dismiss the entire appeal for want of merit.

Before resting her case, the learned Senior State Attorney, made a comment on the sentence which was meted out to the appellant. It was her argument that the said sentence was unconstitutional in that, it was ordered to start running from when he was arraigned in Court. At the said period, the appellant had not been proved to be guilty of the charged

offence. She thus asked us to rectify the anomaly and direct the sentence to start running from the date when the appellant was convicted of the charged offence.

In a brief rejoinder, Mr. Mtobesya reiterated his submission in chief. On the question of the sentence meted out against the appellant, he went along with his learned friend though in a different form. While he agreed with her on the illegality of the sentence, to him the illegality was founded on the fact that it was excessive. He however had no qualms with the issue of the sentence starting to run from when the appellant was arraigned before the court arguing that, from then the treatment which the appellant received while in remand, was similar to that of a convict. He thus implored the Court to reduce it to the minimum term in case the appeal will be found without merit.

What stands for our deliberation and determination in the light of the submissions from either side above, is the issue as to whether the appeal is merited. We are going to answer the grounds of appeal formulated by Mr. Mtobesya seriatim save for the second and fifth grounds, which will be considered conjointly as the last ground.

We start with the first ground which is to the effect that the charge against the appellant was duplex. It is the position of law that a charge may suffer from duplicity where the commission of two distinct offences have been lumped in one count. See: **Maliki Morgan's** case (supra). In moving us to sail with him, Mr. Mtobesya submitted that each act mentioned in section 2 of **the Drugs Act** while defining the term trafficking, infers to a separate offence. To appreciate his stance, we reproduce the definition of the word "trafficking" as provided in the section where it is said that to mean: -

> *"the importation, exportation, manufacturing, conveyance, delivery or distribution by any person, of narcotic or psychotropic substances any substance represented or held out by that person to be narcotic drug or psychotropic substance".*

While Mr. Mtobesya was of the view that each act as contained in the provision quoted above constitutes a separate offence, Ms. Matikila on the other hand, argued that the acts mentioned in the provision refer to the methods of committing the offence and not offences in themselves. On our part, we are in agreement with Ms. Matikila that the named acts do not represent types of offences but ways of committing the offence termed

"trafficking". We therefore find the first ground of appeal not merited and we dismiss it.

As it was for the learned Senior State Attorney, we as well skip the second ground which will be considered later, and move to the third ground wherein, the admission of exhibit P10 that is, the statement which was made by the late Abasi Mingole, was challenged for infringing the provisions of section 34B (1) (c) of **the TEA,** which is couched in these words: -

> *"(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) n/a*
>
> *(a)n/a*
>
> *(b)n/a*
>
> *(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he*

made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;"

Even though both learned counsel were at one on the point that the statement under scrutiny, bears a declaration of the maker, their departure is on the location where the declaration has been placed in the statement. While Mr. Mtobesya argued that the placing of the declaration of the maker at the beginning of the statement instead of at the end was a serious irregularity relying on our decision in **Elias Melami Kivuyo's** case (supra), Ms. Matikila on the other hand argued that the placement of the declaration at the beginning of the statement, did not prejudice either party. She statement was even more plausible in that, the maker gets alerted before he/she gives the statement on the consequences which may follow from the statement he/she is about to give.

Part of our holding in **Elias Melami Kivuyo's** case where the definition of section 34B (2) (c) of **the TEA** in which Mr. Mtobesya pegged his argument, reads that: -

"To be noted here is that the condition is couched in the past tense, which shows that the declaration is made after the statement has been made, not before it."

While we fully subscribe to the definition quoted above, we note that the same was made before the advent of the overriding objective in our jurisprudence. With its introduction as brought about by the amendment to the Appellate Jurisdiction Act Cap 141 R.E. 2002 **(the AJA**) by Act No. 8 of 2018 we are settled in our minds that the strict interpretation of the provision as applied in **Elias Melami Kivuyo's** case above, is no longer tenable. What was relevant in our view, for the statement to be acted upon, was the presence of the declaration by the maker. We subscribe to Ms. Matikila's argument that, the position where the declaration was placed in the statement was immaterial. Consequently, we dismiss the third ground of appeal.

The gist of the fourth ground is centred on the admission of exhibit P10, which was done without involving the appellant, which was strongly criticized by Mr. Mtobesya. On the other hand, his learned friend argued to the contrary for the reason that he was represented. On our part, after going through the decision in **Abubakari Hamisi's** case which was heavily

relied upon by Mr. Mtobesya in his submission, we were able to note that, the portion used his submission did not constitute the decision in that case. The argument that even where the appellant is represented has to be asked if he/she objects to the admission of his/her cautioned statement was stated just in passing and hence could not be used as an authority.

Besides, the appellant and his counsel were given by the trial Judge sufficient time to deliberate on whether the cautioned statement was to be admitted or not, and they came out with the answer that it could be admitted, we think the idea to resist it in this appeal has come as an afterthought which we find difficult to accommodate. That said, we dismiss the fourth ground.

The complaint by the appellant in regard to the sixth ground was about the analysis which was made by PW2 in exhibit P2. The challenge was based on the form of P2 that it was just a correspondence letter and not a report. With due respect to the learned counsel, we have faced some difficulties in appreciating the basis of his complaint. Apart from the fact explained by Ms. Matikila that the law has not prescribed any format on how the report should be prepared, what was required of PW2 was the outcome of the analysis which she made to the substance that was sent to

her and nothing else. The result therefore, could have been in any form as it was the case here. Our holding in **Khamisi Said Bakari's** case (supra), is relevant when we held that: -

> *"The report from the Government Chemist reports the test result on the seventy-five pellets PW2 had submitted on 8th November, 2012 for analysis. In any case, whether it was a report or not, that does not affect its admissibility; it is but an evidential question."*

In the same vein, we find the sixth ground of appeal bereft of merit of which we dismiss.

In the seventh ground, the appellant challenged the weight of the 54 pellets of narcotic drugs alleged to have been trafficked by the appellant. The challenge was based on the method which was used that is, instead of measuring the weight of all of them, their weight was calculated by using the weight of two of them which had been taken as sample. What we had to ask ourselves is the question as to whether the doubt expressed by Mr. Mtobesya was founded. Since the contention by PW2 that the pellets constituting exhibit P1 were alike, there was nothing wrong in weighing them by sampling. Additionally, this procedure was said by PW2 to be the

one introduced and adopted by the United Nations. The fact that Mr. Mtobesya did not cite any law which was breached, we find this ground of appeal baseless and we dismiss it.

Finally, we move to consider conjointly the second and fifth grounds of appeal in which, the complaint by the appellant is based on the admission of 38 pellets of the narcotic drugs as well as the other 16, all of which were admitted as exhibit P1, and the reliability of the testimonies of PW4, PW7, PW8 and PW10.

Starting with the 38 pellets allegedly retrieved from the bag of the appellant, we were urged by Mr. Mtobesya to doubt their evidential value for two reasons. One, that there was no search order or seizure note, which was tendered in evidence to establish that they were indeed recovered from the appellant in compliance with the provision of section 38 of **the CPA**. Two, that the socks and shoes in which they were alleged to have been wrapped during recovery, were not tendered in evidence.

After considering the submission from either side, we are inclined to side with Ms. Matikila that the need for a search order or seizure certificate in the instant matter did not arise due to its urgency. There was ample

evidence which was tendered to establish that the need to search the appellant, arose as an emergence incident after the appellant had been suspected, while people were in their ordinary course of business. Under the situation, there was no time for the police officers to seek for a search order from the relevant authorities. The situation in the appeal at hand was similar to the one we encountered in **Marceline Koivogui's** case (supra), where also an emergence search had to be conducted. We stated that such situation did not call the procedure under section 38 of **the CPA,** but befits section 42 (1) of the same Act.

With regard to the argument by Mr. Mtobesya that the socks and shoes in which the pellets had been wrapped were not tendered in evidence, we are in agreement with the learned Senior State Attorney, that their presence would have added nothing to the value of the evidence obtained from the direct oral testimonies of PW5, PW11 and PW12 who eye-witnessed the recovery of the narcotic drugs the subject of the charge, from the bag of the appellant. We note that among these witnesses, there were some who were police officers, while others were not and therefore the question that there was collusion did not arise.

It was further submitted by the learned counsel for the appellant, that PW4, PW7, PW8 and PW10 failed to identify the 16 pellets which were said to have been excreted by the appellant while under observation at the airport. This argument was countered and correctly so in our view, by Ms. Matikila, that the identification of the pellets which were alike had to be appreciated with their chain of custody.

In establishing the chain of custody, there was evidence tendered to establish that after the seizure of the 38 pellets which were retrieved from the appellant's bag at the airport, they were put into the custody of PW12 who later, handed them over to PW3 who recorded in a register and labelled them, before preserving them in the exhibit room in which access could only be gained in her presence and the in-charge of the ADU, who kept the keys of the second door leading inside the room.

With regard to the pellets which were excreted by the appellant while under observation at JNIA, after being excreted, they were put into the custody of PW5, who in turn handed them over to PW3 in two phases. On the 5/3/2011 there were handed over five pellets, while on the 6/3/2011 at 14:00 there were handed eleven other 11 pellets all of which were registered in the same case number with the previous 38 pellets.

On the 8th March, 2011 PW3 parked all the 54 pellets and sealed them in the presence of the in-charge of ADU, the appellant and PW9 ready for sending them to the Chief Government Chemist for analysis. Thereafter, PW3 in the company of Assistant Inspector Emanuel Shango sent the pellets to the Chief Government Chemist, who after analyzing them, returned them to PW3 who kept them in the exhibit room until when they were tendered as exhibit in Court. The direct oral testimonies of PW1, PW2, PW3, PW5, PW9 and PW12 left us with no shred of doubt that, there was any point in time when the chain of custody in respect of the narcotic drugs under scrutiny (exhibit P1) got broken. We thus find the assertion by Mr. Mtobesya, that the witnesses failed to identify the pellets to lack basis.

We had a look at the decision in **Alberto Mendes's** case which was relied upon by Mr. Mtobesya in his submission. What we discerned from it tallies with what Ms. Matikila submitted before us that, the circumstances were distinguishable. While discussing the testimonies of PW7, PW11, PW12 and PW13 which were being disputed in the earlier case, the Court stated in part as reflected on page 28 of the typed judgment that: -

> *"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 Court. Going direct to the point, we agree with Mr. Mtobesya that there were material contradictions in the witness's statements when compared to their oral testimonies before the trial Court."

When we revert to the appeal at hand, it is to be noted that there were no any contradictions which were pointed out by Mr. Mtobesya, to what the witnesses testified in Court. The only complaint fronted against these witnesses was their failure to identify the pellets which we believe to have sufficiently been dealt with above. As their oral testimonies remained intact, there is no any basis whatsoever, to challenge the trial Judge in acting upon such testimony.

Mr. Mtobesya still had another string left to his bow whereby, he diverted his challenge against exhibit P1 on the failure by the prosecution to label the 16 pellets allegedly excreted by the appellant while under observation at JNIA. He Argued that such failure attributed to the failure by PW4, PW7, PW8 and PW12 to identify them in Court. For better appreciation of the procedure for labelling of exhibits, we reproduce paragraph 8 (1) of **the PGO** which provides for the process. It reads: -

"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."

To begin with, we wish to qualify the complaint by Mr. Mtobesya that, it was not correct to argue that the narcotic drugs in the instant appeal, were not labelled. According to PW3, they were labeled after they had been taken to the ADU office and marked JNIA/IR/52/2011. So the complaint by Mr. Mtobesya should be limited to the period after their seizure at the airport. In that period, the reason for not labeling them was given that, the Police Officers who arrested and seized the pellets from the appellant were not the investigators of the case and therefore, they lacked the requisite mandate to label them in terms of paragraph 8 of **the PGO** quoted above. To us, the said answer sufficiently put to rest the complaint by Mr. Mtobesya with nothing more. We thus dismiss the second and fifth grounds of appeal.

Lastly, we look on the legality of the sentence of imprisonment which was imposed to the appellant, when the learned trial Judge stated thus: -

"In addition, the accused will serve 32 years' imprisonment, the sentence commences to run from the date he was detained in remand custody that is 9/3/2011."

It was submitted by Ms. Matikila, that the sentence was illegal because it was ordered to start running in the period when the appellant had not been proved to be guilty. This according to her, was against the Constitution which presumes one innocent until when proved guilty. And in respect of the period of incarceration, regard being had to the fact that its minimum sentence was 20 years, the learned Senior State Attorney argued that, the order of the Judge had no problem because it fell within his discretion.

On his part, Mr. Mtobesya joined hands with his learned friend that the sentence was illegal. However, in accounting for its illegality, he argued that it was because it was excessive in that, the trial Judge failed to give reasons as to why he exceeded the minimum period. Commenting on the period when it started to run, he sided with the trial Judge, that was correct to commence from when he was detained in remand because the treatment according to a remand inmate and a convict are the same.

On our part, we cannot be precise more than reproducing what we stated in **Vuyo Jack Vs the Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported), where on being encountered with an akin situation, we stated thus: -

> *"--- since the appellant was at the time arrest not yet convicted, bearing in mind the 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."*

To that end, we hold that it was improper for the trial Judge to order the sentence against the appellant to start running from when he was detained because by then, it had not yet been proven that he was guilty of the charged offence.

As regards the contention that the sentence was excessive, the issue to be considered is whether it was illegal. In terms of section 16 (1) (b) (i)

of **the Drugs Act**, under which the offence against the appellant was preferred, the minimum sentence for the charged offence was twenty years, while the maximum sentence was life imprisonment. The trial Judge imposed a sentence of thirty-two years. Going by the principles of sentencing, the sentence was not illegal. We held in **Mohamed Ratibu @ Said Vs Republic,** Criminal Appeal No. 11 of 2004 (unreported) that: -

> *"It is a principle of sentencing that an appellate Court should not interfere with a sentence of a trial court merely because had the appellate been the trial court, it would impose a different sentence. In other words, an appellate Court can only interfere with a sentence of a trial court if it is obvious that the trial court has imposed an illegal sentence or had acted on a wrong principle."*
>
> See also: **Ogalu s/o Owoure Vs Reginam** [1954] 21 EACA 270 and **Elias Kifungo Vs Republic,** Criminal Appeal No.208 of 2010 (unreported).

The fact that the sentence which was imposed by the learned trial Judge in the instant appeal fell between the minimum term of twenty years and the maximum term of life imprisonment, in the light of what we held

above, we have no any justifying grounds whatsoever, to interfere with it. That said, the appeal stands dismissed in its entirety save for the running of the sentence, which we order to commence running from the date when the appellant was convicted of the charged offence.

Order accordingly.

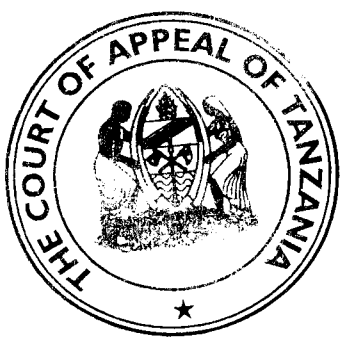
DATED at **DAR ES SALAAM** this 5th day of August, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

J. C.M. MWAMBEGELE
JUSTICE OF APPEAL

DR. M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 7th day of August, 2020 in the presence of the appellant in person-linked via video conference and Ms. Tully Helela, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL