IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 472 OF 2017

ABAS KONDO GEDE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Korosso, J.)

Dated the 20th day of September, 2017

in

Criminal Sessions Case No.16 of 2015

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JUDGMENT OF THE COURT

11th May & 12th August, 2020.

WAMBALI, J.A.:

The appellant, Abas Kondo Gede appeared before the High Court of Tanzania at Dar es Salaam where he was prosecuted on allegation of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drug Act, [Cap.95 R.E.2002] [DPITDA]. According to the record of appeal, twelve prosecution witnesses, namely, Bertha Fredrick Mamuya (PW1), SP Neema Andrew Mwakagenda (PW2), Zainabu Duwa Maulana (PW3), Assistant Inspector Alphonce Boniface

Mwakele (PW4), D7262 S/SGT. Mashaka (PW5), Christopher Joseph Shekiondo (PW6), F6059 D/SGT Athumani (PW7), Joseph Msuya (PW8) Joel Sanga (PW9), Ramadhani Athumani Njopeka (PW10), Amiri Ali Abbas (PW11) and Assistant Inspector Wamba (PW12) appeared to support the charge. It was alleged that the appellant was arrested at Julius Nyerere International Airport (JNIA) upon disembarking from Qatar Airways on 14th May, 2011 whereupon while in detention he defecated a total of seventy seven (77) pellets of narcotic drugs, namely, cocaine hydrochloride weighing 1,171.76gms.

The prosecution also strengthened its case by tendering at the trial thirteen (13) exhibits which were admitted as evidence. These included, an envelope containing 77 pellets (exh.P1), Chief Government Chemist Report concerning the analysis of the illicit drugs (exh.P2), emergence travel document (exh.P3), Air ticket (exh.P4), certificate of value (exh.P5), Observation Form (exh.P6), statement of D5545 D/SGT Fidelis (exh.P7), Summons to appear for S4848 D/CPL Charles (exh.P8), Statement of D4828 D/CPL Charles (exh.P9), Summons to appear for Charles Chacha (exh.P10), Statement of Charles Chacha (exh.P11), returned summons to appear for Peter Kavishe (exh.P12) and Statement of Peter Kavishe (exh.P13).

It was firmly contended by the prosecution witnesses that the appellant was arrested on 14th May, 2011 soon after he disembarked from Qatar Airways from Sao Paulo Brazil. The prosecution also asserted that in the course of his detention at JNIA from 14th – 18th May, 2011 the appellant defecated a total of seventy seven (77) pellets in a special toilet. The said pellets were later analysed by the office of the Chief Government Chemist (CGC) and it was found that they contained a chemical substance known as Cocaine Hydrochloride as testified by PW1 and supported by exhibit P2.

In his defence, the appellant vehemently distanced himself from the allegation and contended that the case against him was unfounded. He maintained that his arrest came after he demanded to be given his wallet which contained, among others, USD.2700, Brazil Rias 200, ID card and clinic card which were taken from him by the police officers after arguing and fighting with them soon after he arrived at JNIA. The appellant insisted that the charge was framed by the said police officers as he was not informed the reasons for his arrest and detention. However, he did not dispute the date of his arrest, that is, 14th May, 2011 and the fact that he arrived at JNIA from Sao Paulo Brazil as evidenced by exhibits P3 and P4.

The trial High Court judge evaluated and considered the evidence for both sides and in the end she found the appellant guilty of the offence he

was charged with. Consequently, she convicted and sentenced him to serve imprisonment for a term of twenty two (22) years and to pay a fine of TShs. 175,764,000/=.

Aggrieved, the appellant has appealed to this Court to contest both the conviction, sentence and an order for payment of a fine. To express his dissatisfaction with the trial court's findings and sentence, he lodged a Substantive Memorandum of Appeal comprising sixteen grounds of appeal followed by the Supplementary Memorandum of appeal comprising ten grounds of appeal. He also lodged written submissions to support his contention that the case against him was not proved to the hilt. Generally, he maintained that the trial judge wrongly convicted and sentenced him for the offence of illicit trafficking in narcotic drugs while the prosecution did not prove the case against him beyond reasonable doubt. Having carefully scrutinized all the grounds of appeal, and after we heard the submissions from both sides, we propose to compress them into the following: -

> *One, that the information placed at the trial court was defective for containing insufficient particulars.*
> *Two, that the evidence of PW7 was wrongly admitted as evidence and relied upon to ground the appellant's conviction while the said witness was not affirmed before he testified.*

Three, that the chain of custody was not fully established and substantiated by documentary evidence.

Four, that the appellant was convicted for having in possession of the alleged cocaine hydrochloride which is not among the illicit drugs prescribed in the First Schedule to the Drugs and Prevention of Illicit Traffic in Drugs Act (Cap 95 – R.E. 2002).

Five, that the indicated total weight of 1,171.76 grammes of the narcotic drugs was wrongly obtained by weighing the weight of three pellets only out of the 77 pellets.

Six, that the Commissioner for Drugs Control and Coordinating Commission (PW8) had no power under section 27 (1) (b) of Cap 95 to prepare the certificate of value which was relied to establish the value of the alleged illicit drugs and to determine the sentence.

Seven, that the trial court wrongly relied on the evidence of an additional witness (PW12) together with the statements he tendered namely exhibits P9, P11 and P13 while his name was not listed and his statement read over at the committal proceedings.

Eight, that the prosecution witnesses were not credible to ground the appellant's conviction.

Nine, that the observation form (exhibit P6) was wrongly admitted as evidence and relied upon by the trial court to ground the appellant's conviction while it had no legal force for not being provided as one of the forms under the First Schedule to the Drugs and Prevention of Illicit Traffic in Drugs Act.

Ten, that the case against the appellant was not proved beyond reasonable doubt.

Eleven, that the sentence imposed on the appellant by the trial court was improper for failure to consider his mitigation of having stayed in remand custody for six years.

At the hearing of the appeal, the appellant's appearance in court was facilitated through a video conference that was linked to Ukonga Central Prison. It is noteworthy that earlier on, Mr. Ngassa Ganja Mboje, learned counsel was assigned by the Registrar to represent the appellant and he duly appeared in court on that date. However, before we commenced the hearing, we discharged him after the appellant indicated that he did not require his services. Consequently, the Substituted Memorandum of Appeal

which Mr. Mboje had lodged in Court in substitution of the appellant's memoranda of appeal was marked withdrawn.

On the other side, the respondent/Republic was duly represented by Ms. Anunciata Leopold learned Senior State Attorney, assisted by Mr. Salim Msemo and Ms. Clara Charwe both learned State Attorneys. Noteworthy, the respondent/Republic strongly contested the appellant's appeal contending that it is devoid of merit.

With regard to the first ground, the complaint of the appellant is that the particulars of the offence did not disclose the elements and mode of trafficking the alleged narcotic drugs that took place. In addition, the appellant contended that the destination where the alleged narcotic drugs were trafficked to or from was not indicated in the particulars of the information. In his argument, this rendered the omission incurable as he was greatly prejudiced to the extent of failing to prepare his defence properly for not knowing the offence which he was alleged to have committed. To support his contention, he referred the Court to the decision in **Mussa Mwaikunda v. The Republic** (2006) TLR 387. Essentially, he contended that the particulars in the information was supposed to enable him to know the nature of the case that faced him by showing essential elements of the offence. In his firm opinion, the prosecution failed

completely to comply with the requirement of the law for having insufficient particulars that did not disclose the important elements of the offence that he was confronted to defend. Ultimately, he urged the Court to find that the information was defective and acquit him as the omission is incurable.

In response, Ms. Leopold argued that the complaint of the appellant is unfounded as the particulars clearly indicated that he was arrested at JNIA when he arrived from Brazil aboard Qatar Airways and that, he was found with the narcotic drugs which upon analysis it was established to be cocaine hydrochloride. She emphasized that the particulars disclosed that he trafficked in the said narcotic drugs into Tanzania from Brazil. In the event, the learned Senior State Attorney urged us to dismiss the first ground of the appeal.

On our part, we have carefully scrutinized the information in the record of appeal and we agree with the learned Senior State Attorney that the particulars of the offence sufficiently disclosed that the appellant was alleged to have trafficked in Tanzania from Brazil the alleged narcotic drugs. The particulars further informed the appellant the exact date when he arrived at JNIA and the mode of transport. Moreover, he was informed through the particulars that he was found in possession of seventy seven

pellets of cocaine hydrochloride that weighed 1,171.76gms. It is no wonder that in his spirited defence the appellant disassociated himself from the commission of the offence and explained that he was arrested after a quarrel occurred between him and the police who were at the JNIA who later framed up the case after dispossessing him of his wallet that contained USD. 2,700 and Brazil Rias 200 among other properties for no apparent reason.

Indeed, the emergence travel document which was issued in Brazil and the air ticket which were admitted as evidence as exhibits P1 and P2 respectively without objection from the appellant who was represented by two counsel rendered credence to the fact that the appellant arrived at JNIA form Sao Paulo Brazil. Besides, from the evidence in the record of appeal as we have alluded to above the appellant did not dispute that he was arrested soon after he disembarked from Qatar Airways from Brazil. Thus, considering the information provided in the particulars of the offence that confronted the appellant, we are settled that the information was not defective for having insufficient particulars as contended by the appellant. In the circumstances, while we acknowledge the relevance of decision of the Court in **Mussa Mwaikunda** *(supra)* on the importance of the information to contain sufficient particulars, we are settled that the same

cannot apply in the circumstances of this appeal as the facts in that case are distinguishable. In the result, we dismiss the first ground of the appeal for lacking merit.

As regards the second ground of appeal, it is noted that the complaint of the appellant that the trial court wrongly relied in the un affirmed evidence of PW7 was readily conceded by Ms. Leopold. As the complaint is fully backed by the trial court's proceedings in the record of appeal the learned Senior State Attorney urged the Court to disregard and expunge PW7's testimony from the record. In the circumstances, we accordingly expunge from the record of appeal the evidence of PW7 together with exhibit P6 (the Observation Form) which was tendered by the said witness. We wish to urge trial courts that a witness who is called to testify for either party must be sworn or affirmed, as the case may be, failure of which the evidence recorded and admitted is rendered valueless for offending the provisions of section 198(1) of the Criminal Procedure Act Cap. 20 R.E. 2019 (the CPA). For purpose of emphasis see the decisions of the Court in **Kisonga Ahmed Issa and Another v. The Republic,** Consolidated Criminal Appeals No.177 of 2016 and No.362 of 2017; **Mwita Sigore @ Ogopa v. The Republic,** Criminal Appeal No. 34 of 2004; **Khamis Samwel v. The Republic,** Criminal Appeal No.320 of 2010 and

Mwami Ngura v. The Republic, Criminal Appeal No. 63 of 2014 (all unreported).

In the third ground, the appellant complains that the chain of custody was not fully established as it was not substantiated by documentary evidence as required by the law. He elaborated that after his arrest the police officers did not follow the procedure of documenting the handling of the alleged 77 pellets as prescribed in the Police General Orders (the PGO). The appellant emphasized that there was no detention and exhibits registers which were produced by the police officers to show that the alleged seized narcotic drugs were recorded after his arrest at JNIA. He further argued that there is no evidence that the alleged 77 pellets were labelled, sealed and packed at JNIA before they were sent to ADU Officers at Kurasini contrary to the requirement prescribed in the PGO. In addition, he stated that there was no documentation to show the handing over of the alleged 77 pellets between PW5 who allegedly sent them to PW2 for safe custody before they were sent to the CGC for laboratory analysis. The appellant also submitted that there was no arrest warrant to show that he was arrested in connection of the offence at JNIA and that no x-ray examination was done to prove that at the time of his arrest he had swallowed the 77 pellets in his stomach. In his opinion the chain of custody

was broken and the authenticity of the pellets was doubtful as they were not sent to the CGC for laboratory analysis immediately after they were allegedly packed and sealed on 18th May, 2011 at ADU offices at Kurasini until 6th June, 2011. To emphasize his argument on the omission of the police officers to comply with the PGO 229 he referred the Court to decision in **Sharif Mohamed @ Athuman and 6 others v. The Republic**, Criminal Appeal No. 74 of 2016 (unreported).

Overall, the appellant maintained that failure of the prosecution to show the paper trail documentation on how the alleged pellets were handled by the prosecution witnesses from his arrest, seizure, custody, control and transfer from ADU offices to the CGC until when they were tendered at the trial court broke the chain of custody. Thus, he argued that it was not possible at the trial for the prosecution to show that the 77 pellets which were allegedly seized after his arrest were the same which was tendered by PW1 and admitted as evidence by the trial court. To this end, he implored us to be inspired by the decisions of the Court in **Paulo Maduka and 4 Others v. The Republic,** Criminal Appeal No. 110 of 2007 and **Zainab Nassor @ Zena v. The Republic,** Criminal Appeal No. 348 of 2015 (both unreported). Therefore, relying on those decisions the

appellant urged us to find that the chain of custody was not fully established and expunge exhibit P1 from the record of proceedings.

The appellant's argument was strongly countered by Ms. Leopold, who argued that the absence of paper trail documentation on how the 77 pellets were handled from arrest until tendering at the trial court did not break the chain of custody.

In her submission, the police officers, namely, PW4, PW5 and the statements of the other police officers which were tendered as exhibits P9, P11 and P13 respectively who witnessed the defecation of the 77 pellets by the appellants at JNIA at different intervals from 14th -18th May, 2011 after his arrest demonstrated clearly how the said pellets were handed over to PW2 who kept them in exhibit room for safe custody. Moreover, she submitted that the 77 pellets were packed, sealed and labelled at ADU Offices at Kurasini before they were sent to CGC for laboratory analysis. She emphasized that it was difficult to label the said pellets at JNIA after they were seized from the appellant due to the prevailing circumstances and that is why they were immediately sent to PW2. Ms. Leopold argued further that the delay in sending the 77 pellets to the office of the CGC for analysis from ADU offices occurred because one of the persons who kept the keys of the exhibit room had travelled as evidenced by the testimony of

PW2. She maintained that to substantiate that the pellets were not tempered with at any stage of the investigation and prior to the tendering at the trial court, police officers namely, PW4, PW5 and those whose statements were tendered and admitted as evidence and other independent witnesses, namely, PW8, PW9, PW10 and PW11 who witnessed the defecation of the pellets by the appellant at JNIA, and PW3 who was present when the pellets were packed and sealed at ADU Offices at Kurasini in the presence of the appellant identified and recognized the said pellets as the ones they saw previously before the trial. Besides, she submitted, after the appellant defecated the pellets at JNIA they were immediately sent to PW2 for safe custody.

In the circumstances, the learned Senior State Attorney was content that even in the absence of paper trail documentation, oral evidence of the prosecution witnesses was sufficient to prove that the chain of custody was not broken as there is no evidence that the pellets were tempered at any stage of handling, custody and transfer from PW2 to CGC and back to PW2 before they were tendered at the trial. To support her submission, she implored us to apply the decision of the Court in **Kadiria Saidi Kimaro v. The Republic,** Criminal Appeal No.301 of 2017 (unreported) and dismiss this ground of appeal.

It is acknowledged that the movement of the exhibits from one person to another should be handled with great care to eliminate any possibility that may allow tempering. It must thus be shown that in handling the respective exhibits chances of tempering was eliminated based in the circumstance of each case.

It is also noted that the desirable method of establishing the chain of custody is documentation of the chronology of events in the handling of exhibit from seizure, control, transfer until tendering in court at the trial as stated in **Paulo Maduka and 4 Others** (supra) which was followed in other decisions, including **Makoye Samweli @ Kashinje and Kashindye Bundala,** Criminal Appeal No.32 of 2014 (unreported) to mention but a few.

However, as the Court stated in **Joseph Leonard Manyota v. The Republic**, Criminal Appeal No.485 of 2015; **Kadiria Said Kimaro** (supra) and **Chacha Jeremiah Murimi and Three Others v. The Republic**, Criminal Appeal No.551 of 2015 (unreported) documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of exhibit and its handling will not fail the test merely because there was no documentation. It follows that depending on the circumstances of every particular case, especially where the tempering of

exhibits is not easy oral evidence will be taken to be credible in establishing the chain of custody concerning the handling of exhibits.

As it was stated in **Paulo Maduka and 4 Others** (supra): -

"The *idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime ...*"

Yet in **Zainabu d/o Nassor @ Zena v. The Republic**, Criminal Appeal No. 348 of 2015 (unreported) it was stated among others that the underlying rationale for ascertaining a chain of custody is:

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

Therefore, even where the chain of custody is broken, the court may still receive the exhibit into evidence depending on the prevailing circumstances in every particular case provided it is established that no injustice was caused to the other party.

Applying the above observations and the holding of the Court to the present case, we have no hesitation to state that in the light of the evidence in the record of appeal, it cannot be safely concluded that the absence of paper trail documentation made the chain of custody to be broken as argued by the appellant. On the contrary, there is ample oral

evidence showing that the seizure, custody and control, transfer and analysis and disposition of the pellets in the trial court was not interrupted at any stage. We say so based on the following reasons; First, witnesses who witnessed the defecation of 77 pellets by the appellant at JNIA after his arrest and his detention from 14th – 18th May, 2011, namely, PW4, PW5, PW8, PW9, PW10 and PW11 and Peter Kavishe whose statement was admitted as exhibits P13, being eye witnesses demonstrated that they were present during the said process of defecation. They also recognized and identified the appellant at the trial as the one they saw at JNIA and indeed, they were consistent in their story even during cross – examination. As we all know an eye witness is a crucial witness whose evidence being oral is direct as provided under section 62 (1) (a) of the Evidence Act, Cap. 6 R.E 2019. Thus, "*an eye witness is a person who has seen something happen and gives a firsthand description of it" (*see free dictionary found at w.w.w. google.com visited on 4th August, 2020).

It is in the record of appeal that the respective witnesses also testified that after the pellets were recovered from the appellant at JNIA they were sent to PW2 for safe custody. From the testimony of these witnesses on how the arrest of the appellant was effected, it was not necessary that those who arrested him had to possess the arrest warrant

as argued by the appellant. We are satisfied that the circumstances which led to the arrest of the appellant by police officers was covered by the provisions of section 14 (1) (a) of the CPA in which the respective officer can arrest the suspect without arrest warrant.

On the other hand, the absence of the seizure certificate was fully covered by the oral evidence of the respective witnesses who witnessed the defecation of the 77 pellets by the appellant who had swallowed them in his stomach prior to his arrival in Tanzania from Brazil and were excreted through the anus. The defecation was done few hours after the appellant's arrest and detention and continued for some few days as alluded to above.

Second, PW2 confirmed that she received the 77 pellets from the JNIA-ADU office as stated by the witnesses and kept them into custody.

Third, PW2 also demonstrated that the said 77 pellets were packed, sealed and labeled on 18th May, 2011 at ADU Headquarters at Kurasini before they were transferred to CGC for laboratory analysis in the presence of the appellant and PW3, a ten cell leader who was an independent witness. Notably, the evidence of PW3 was not strongly challenged by that appellant's counsel at the trial as she remained consistent in her testimony that she witnessed the packing, sealing and labelling of the pellets.

Besides, at the trial she identified the pellets which had been tendered and admitted as exhibit P1.

Fourth, PW2 explained substantially the circumstances that prevented the labeling of the 77 pellets at JNIA which was the scene of the crime. Like the trial court, we do not doubt her explanation on the issue.

Fifth, PW2 also explained the delay of sending the 77 pallets from ADU offices to the CGC from 18th May to 6th June, 2011. She substantiated the delay by the fact that during the said period the Head of the Anti-Drugs Unit, one SACP Godfrey Nzowa who was also the custodian of one of the keys of the exhibit room where the pellets were stored had travelled, and therefore PW2 alone could not open the exhibit room in his absence. In our considered opinion the delay was within a reasonable time. We are also satisfied that the fact that two persons were responsible for keeping the keys of the exhibit room demonstrated that tempering by one of them was difficult. Thus, we have no reason to differ with the finding on the trial court that the testimony of PW2 concerning the complained delay was credible.

Sixth, PW1 confirmed that she received the 77 pellets (exhibit P1) from PW2 and after the laboratory analysis she returned them to PW2

together with exhibit P2 which contained the report showing that the pellets contained a chemical substance known as cocaine hydrochloride. PW1 also identified the 77 pellets (exhibit P2) at the trial court as the same which she returned to PW2 for save custody. Noteworthy, her evidence was not seriously challenged by the appellant's counsel during cross examination. Thus, as both exhibits P1 and P2 were received as evidence without objection, the appellant cannot be heard to complain at this stage of the appeal concerning its authenticity. As the Supreme Court of India observed in **Malanga Kumar Ganguly v. Sukumar Mukherjee,** AIR 2010 SC 1162 that: -

> *"It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless the author thereof is examined, the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of Law."*

In the present case since PW1 was fully cross-examined by the appellant's counsel after exhibits P1 and P2 were admitted into evidence, we find that his complaint is unfounded.

We must emphasize that oral evidence being one of the method of receiving evidence in a court of law, is crucial in proving a particular fact and the court is entitled to rely on it in reaching its conclusion. By oral evidence it means that a witness tells the court only a fact of which he has first-hand personal knowledge or that he perceived the fact from his senses.

Indeed, section 3 of the Evidence Act, Cap. 6 R.E. 2019 defines oral evidence as:

"*All statements which the Court permits or requires to be made before it by witnesses in relation to the matter of fact under inquiry; such statements are called oral evidence.*"

Therefore, oral evidence, if worthy of credit, like in the circumstances obtaining in the present case, is sufficient without documentary evidence to prove a fact or title. Thus, where a fact may be proved by oral evidence it as not necessary that documentary evidence must supplement that evidence as this is the other method of proving a fact.

On the other hand, we are aware that the PGO requires that a police officer who handles the exhibits from the scene of the crime to another place has to record the particulars of exhibit, the reason why he moves the exhibit from that place and if he hands over the same to another officer he

has to insert his name and signature and to follow other procedures prescribed therein. We have no hesitation to state that there is no indication that there is documentary evidence to show how the internal orders provided in the GPO were followed in the present case.

However, as we have amply demonstrated in our deliberation above, in the light of the oral evidence in the record of appeal, we are satisfied that the omission did not prejudice the appellant as the witnesses sufficiently demonstrated that the chain of custody concerning the seizure, packing and sealing, handling, custody, control and transfer was not broken from the time of arrest until when the 77 pellets were tendered in Court. Moreover, we are settled that in the light of the evidence in the record of appeal it is certain that 77 pellets were not planted by the police officers who arrested the appellant to make him guilty of the offence.

Therefore, in the light of the oral evidence of eye witnesses and exhibits P1 and P2, like the trial court, we are prepared to find, as we hereby find, that the respective witnesses were credible and reliable since they proved that the 77 pellets were not tempered with at any stage of the investigation until when they were tendered at the trial and that they were witnesses of truth. Equally important, in the present case, we hold that there was no vital missing link between the 77 pellets which were seized

from the appellant after defecation, the handling, packing and sealing and analysis by the CGC until when they were tendered at the trial.

From the foregoing deliberation concerning the chain of custody, we have no hesitation to state that even in the absence of paper trial documentation of how the pellets were seized, handled, controlled, stored and transferred form one person to another, the oral evidence sufficiently established that the chain of custody was not broken. It follows that even in the absence of the evidence of PW7 and exhibit P6 which we have excluded from the record of the proceedings of the trial court, we are further satisfied that the remaining evidence in the record of appeal suffices. We are settled that the handling of the pellets was not interfered with and that no tempering was done as alleged by the appellant.

In this regard, we are prepared to hold that the trial judge properly evaluated the oral evidence of the prosecution witnesses together with exhibit P2 and the defence of the appellant and came proper conclusion that the said witnesses were credible and reliable. In the circumstances of this case, the decisions of the Court in **Kadiria Said Kimaro (supra) and Charo Said Kimilo and Another v. The Republic**, Criminal Appeal No.111 of 2015 (unreported) apply squarely to support the position that oral evidence sufficed in the absence of paper trail documentation. In the

result, the decisions of the Court in **Paul Maduka and 4 Others** and **Zainab Nassor @ Zena** (supra) referred by the appellant in support of his position that the chain of custody was not established for failure to show paper trail documentation are distinguishable and not applicable. Consequently, we dismiss the third ground of appeal.

The other complaint of the appellant contained in the fourth ground is that he was wrongly convicted and sentenced for trafficking 'cocaine hydrochloride' which is not listed in the First Schedule to the DPITDA. In his submission what is in the list is cocaine. In the premises, he maintained that he was wrongly convicted and sentenced for possessing a chemical substance which is not recognized by the law. In the event, he pressed us to allow this ground of appeal.

On her part, Ms. Leopold argued that the complaint of the applicant is an afterthought as it was not raised at the trial. She added that PW1 who is an expert and participated in the analysis to establish the kind of narcotic drug was not cross-examined on the issue and as a result exhibit P1 which contained the 77 pellets was admitted into evidence. The learned Senior State Attorney thus urged us to dismiss this ground of appeal.

Admittedly, what is listed in the First Schedule to the DPITDA is cocaine and not 'cocaine hydrochloride'. Moreover, it is acknowledged that

this issue was not raised at the trial court when PW1 testified and tendered exhibit P2 which was the basis of her finding that at the end of the analysis it was confirmed that the 77 pellets contained a substance known as cocaine hydrochloride. PW1 also stated as per exhibit P2 that cocaine hydrochloride is listed among poisonous substances which causes mental retardation after longtime usage. Undoubtedly, what is indicated in the information that was placed at the trial court is cocaine hydrochloride and not cocaine. Unfortunately, as we have intimated above, PW1 was not cross-examined by the appellant's counsel to substantiate why the analysis concluded that the substance is called cocaine hydrochloride and not cocaine. However, as per exhibit P2, it was not disputed that cocaine hydrochloride is among narcotic drugs in Part One of the list of poisonous drugs. It is instructive to note that in **Kileo Bakari Kileo and 4 Others v. The Republic,** Consolidated Criminal Appeals No.82 o 2013 and 330 of 2015 (unreported), although the issue which was raised was that 'heroin hydrochloride' was not among the narcotic drugs listed in the first schedule but heroin, upon cross-examination, the Chemist who was the witness stated as follows:

> *"There are several types of heroin. The substance at hand is part of the listed poisons. I indicated in my*

report that the substance was heroin hydrochloride. Heroin hydrochloride is a synonym of heroin diacetylmorphine and the two expression relate to the same substance."

In the present case, the scientific and medical description of the contents of the pellets as evidenced by exhibit P2 and the evidence of PW1 is that cocaine hydrochloride is one of the listed poisonous drugs. Therefore, the fact that cocaine hydrochloride is not listed in the First Schedule to the DPITDA did not prejudice or occasion injustice to the appellant in any way.

On the other hand, our research leads us to a finding that cocaine and heroin falls under Class A of the narcotic drugs. More importantly, cocaine is a highly addictive stimulant drug that directly affects the nervous system, including the brain. According to scientific and medical information, cocaine is a natural occurring chemical which is found from the leaves of the coca bush (*Erythroxylum* coca or coca plant). The leaf extract is processed to produce three different forms of cocaine: One, cocaine hydrochloride; a white crystalline powder with a bitter, numbing test. Cocaine hydrochloride is often mixed, or 'cut', with other substance such as lactose, to dilute it before being sold. It is further revealed that cocaine

hydrochloride is water soluble and can be absorbed across the mucous membrane (e.g. nose, gums). Two, freebase; a white powder that is purer with less impurity than cocaine hydrochloride. Three, crack; crystals ranging in colour from white or cream to transparent with a pink or yellow hue, and it may contain impurities (see https:// adf.org.au/drug-facts/cocaine, a website of the Alcohol and Drug Foundation. The information was last updated and published on 27th February, 2020 and visited on 5th August, 2020).

From the above information, we are settled that cocaine hydrochloride being one of the forms of cocaine is among the outlawed type of narcotic drugs of which the appellant was arrested and charged in connection with its possession. We therefore have no hesitation to state that PW1 being an expert who was involved in the analysis of the pellets at the CGC laboratory, was better placed to substantiate that the chemical substance which was found therein was cocaine hydrochloride. In the result, we dismiss the fifth ground of the appeal.

With regard to the sixth ground, the appellant contends that the weight of the narcotic drugs was wrongly obtained by weighing only three pellets out of 77 and thereby approximating the weight of the rest to conclude that the total weight of all pellets was 1171.76gms. In his

submission, as the issue of total weight is crucial for the purpose of assessing the value of the narcotic drugs and determination of the sentence, the Court should find that the procedure adopted in arriving at the correct weight was erroneous to the extent of rendering the trial procedurally unfair.

Mr. Msemo responded by contending that the procedure adopted by CGC to obtain the total weight did not prejudice the appellant at all. He argued that, it is in this regard that the appellant who was represented by counsel at the trial cross examined PW1 concerning the procedure and she fully explained the basis of adopting that course of action and the trial court was satisfied. In the event, he implored us to dismiss the sixth ground of appeal.

On our part, having carefully scrutinized the evidence of PW1 in the record of appeal, we have no hesitation to state that the said witness sufficiently elaborated how the total weight was arrived at though only three pellets were weighed out of seventy seven. In view of the explanation of PW1 which was not seriously challenged by the appellant during cross examination as rightly stated by Mr. Msemo, we are satisfied that the complaint on how the total weight was obtained is misplaced as no

injustice was caused in view of the circumstances of the case. Accordingly, we dismiss the sixth ground of appeal.

As for ground seven, the appellant's disagreement with the decision of the trial court is based on the contention that the certificate of value (exhibit P5) which established the total value of the narcotic drugs was wrongly relied upon as the Commissioner for Drugs Control and Coordinating Commission (PW6) who prepared it under section 27 (1) (b) of the DPITDA had no such powers. In his argument, as the value was crucial for conducting a fair trial and ultimately the trial court wrongly relied on it in assessing the sentence, the Court should find that the certificate of value was wrongly admitted as evidence and relied upon to sentence him.

Responding, Mr. Msemo characterized the appellant's contention as unfounded as the law does not prohibit the certificate of value prepared by the Commissioner for Drugs for purpose of bail consideration to be used during the trial proceedings and ultimately for consideration of sentence upon conviction. To support his submission, he made reference to decision of the Court in **Chukwudi Denis Okechukwu and 3 Others v. The Republic**, Criminal Appeal No. 507 of 2015 (unreported) and urged us to dismiss the seventh ground of appeal.

Admittedly, section 27 (1) (b) of the DPITDA mandates the Commissioner for Drugs to prepare a certificate of value for purpose of bail consideration. However, the said section does prohibit the application of that certificate of value to be used during the trial proceedings including in assessment of sentence upon conviction of an accused. It is in this regard that as correctly stated by Mr. Msemo, the Court in **Chukwundi Denis Okechukwu and 3 Others** (supra) held that the application of certificate of value is intended for both purposes; that is for determination of bail application and assessment of sentence and that its application did not prejudice the appellant in anyway. We hold the same view in the present case. In the result, we find the complaint in ground seven unfounded and hereby dismiss it.

Moreover, the appellant complained in ground eight that PW12's evidence was wrongly admitted into evidence and relied upon to convict him while he was not among the witnesses whose statement was read over at committal proceedings contrary to the provisions of section 289 (3) of the CPA. The appellant argued further that PW12 also tendered at the trial the statements of witnesses who could not be traced without complying with the requirements of section 34B (2) of the Evidence Act, Cap 6 R.E. 2019. In the circumstances, the appellant strongly submitted that the

procedure which was adopted by the trial court to admit the respective witnesses' statements greatly prejudice him. He thus pressed us to disregard the evidence of PW12 and expunge the same together with the statements of the witnesses which were admitted as exhibits P9, P11, and P13.

On the adversary side, Mr. Msemo submitted that the procedure laid under section 289 (3) of the CPA was properly followed by the prosecution before the trial court allowed PW12 to testify. He admitted that PW12 was not among the witnesses whose statements were read over at committal proceedings. However, he explained that the prosecution applied to the trial court and after the objection of the appellant through his counsel, a ruling was made whereupon PW12 was allowed to testify. As for the admission of the witnesses' statements, Mr. Msemo submitted that the prosecution prayed before the trial court to tender the said statements as required under section 34B (2) of the Evidence Act. He added that the appellant's counsel objected to the admission of those statements and the trial judge made a ruling to admit them after she heard both sides and was satisfied that the procedure under the respective law was followed as the witnesses could not be traced. The learned State Attorney therefore refuted the appellant's contention that the law was not complied with

before PW12 was allowed to testify and that the witnesses' statements were improperly admitted into evidence.

We have gone through the record of proceedings concerning the admission of the evidence of an additional witness and the witnesses' statements. Our finding is that the trial judge thoroughly dealt with the appellant's complaint. Noteworthy, initially, the prosecution summoned PW12 but the defence objected and the prayer was withdrawn. However, at a later stage the prosecution made an application in accordance with the requirement provided under section 289 (3) of the CPA and the defence did not object. The trial judge subsequently allowed him to testify. In the event, we find the appellant's complaint to have no basis as it is not supported by the trial court's record of proceedings in the record of appeal.

On the other hand, we also note that the prosecution also made an application under section 34B (2) of the Evidence Act, to tender the statements of the witnesses who by then could not be traced for different reasons. The record indicates that the appellant's side objected, and after the trial court heard both sides of the case, it was ruled that the witnesses could not be traced and allowed the prosecution to tender those statements under the said section. We do not thus find any merit in the appellant's argument as we are satisfied that the trial judge sufficiently

dealt with the issue and was satisfied that the law was complied with as the witnesses could not be traced. Indeed, at the trial, it was not disputed that their statements were read over at the committal proceedings. This indicates that it was not the first time that the appellant became aware of the respective witnesses' statements as they are part of the committal proceedings. Consequently, we dismiss ground seven for lacking merit.

As for the ninth ground of appeal, at this juncture, we need to state that in the light of the decision we have reached concerning the second ground in which we have expunged the evidence of PW7 and exhibit P6, there is no need to consider the complaint of the appellant concerning the legality of the observation form. In the event, we mark the ninth ground to have been overtaken by events.

In ground ten the appellant strongly contended that the prosecution witnesses were not credible to be believed and relied upon by the trial court to substantiate his conviction. The appellant explained that some of the witnesses, namely PW4 and PW10 could not be believed as their evidence at the trial contradicted their statements which they recorded at the police during the trial which were admitted as exhibits D1 and D3 respectively. He submitted further that the evidence of other witnesses, namely PW3 and PW5 could not be relied upon as the trial judge did not

indicate at the end of their testimony as to whether the same was read over to them and found to be correct (R.O.F.C) as required with procedure of recording the evidence before the High Court. The appellant therefore implored us to find that the contradiction in the evidence of some of the prosecution witnesses and failure of the trial court to follow the procedure in recording the evidence greatly affected the trial and find in his favour.

Responding, Mr. Msemo contended that the alleged contradiction is minor as it did not go to the root of the case and the trial proceedings. He submitted further that the failure of the trial judge to indicate that the evidence of some witnesses were read over to them did not prejudice the appellant in any way as there is no indication that what is in the record concerning what the witnesses stated is not correct. The learned State Attorney argued that the prosecution witnesses were credible and thus the trial court correctly relied on their evidence to convict the appellant.

We have thoroughly reappraised the evidence in the record of appeal and we do not generally find the justification that the witnesses for the prosecution were not credible to the extent of not being relied upon to convict the appellant. We are satisfied that the trial judge properly considered the prosecution evidence along with the appellant's defence and rightly came to the conclusion that the case for the prosecution was

amply supported by credible witnesses. Moreover, we do not see any serious contradiction in the evidence of the witnesses stated by the appellant as the same did not go to the root of the case. In addition, we find that the failure of the trial judge to indicate that the evidence of PW4 and PW10 was read over did not prejudice the appellant in anyway as he has not shown that what is in the record is not what the witnesses stated [see **The Republic v. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported)]. Besides it is the witness who is better placed to state whether what is recorded is what he said at the trial. In any case the omission is inconsequential. We are however aware of the decision of the Court that was relied upon by the appellant to support his contention, but we think the same is distinguishable as it is not applicable in the circumstances of this case.

The other complaint of the appellant is that most of the exhibits were tendered by the public prosecutor and not the respective witnesses. We have thoroughly perused the record of appeal and noted that the public prosecutor simply invited the court to receive the exhibits after the respective witnesses had identified them and indicated that they were ready to tender before the court. We are satisfied that this anomaly did not prejudice the appellant because the exhibits were tendered in the course of

the respective witnesses' examination in chief. In addition, after the exhibits were received as evidence the contents thereof were explained or read over loudly. Besides, the witnesses were cross examined by the appellant's counsel concerning those exhibits. Consequently, we find the complaint baseless and accordingly dismiss the tenth ground of appeal.

In ground eleven, the appellant contends that the case against him was not proved to the required standard. The contention is strongly refuted by the respondent Republic. It was the argument of Ms. Leopold that the prosecution proved that the appellant was the one who was found in possession of narcotic drugs which were identified to be cocaine hydrochloride and that he trafficked the same into Tanzania from Brazil. She emphasized that the appellant did not seriously shake the credibility of the prosecution witnesses. In her view, the trial court properly believed the evidence of those witnesses as to a great extent their evidence was direct.

From what we have stated in our deliberation above, it is not disputed that the appellant was arrested at the JNIA soon after he disembarked form Qatar Airways from Sao Paulo Brazil. The appellant did not also dispute that his travel documents namely, exhibits P3 and P4 were seized by the police officers. We do not also lose sight of the fact that eye witnesses for the prosecution were crucial to connect the arrest of the

appellant with the offence he was charged as we have amply demonstrated in the course of our deliberation above. The said witnesses gave an account from the arrest, seizure of the pellets and its handling which indicated that the chain of custody was not broken. Overall, we are satisfied that the defence of the appellant as found in the record of appeal did not raise serious doubt to the evidence of the prosecution which pointed out clearly to the fact that he was fully involved in the commission of the crime he was charged with and convicted of.

The other complaint of the appellant is that the prosecution poorly investigated the case as the document which was attached to the information indicated that he is a footballer while his emergency travel document indicated that he is a businessman. In his view, the misinformation intended to mislead and prejudice him during the trial. However, we think the contention is unfounded as the attached document was not part of the particulars of the information which we have found to have sufficiently informed the appellant concerning the offence which faced him. Indeed, at any rate, no witnesses stated that he was a footballer and his occupation was not the basis of his conviction.

Essentially, at the trial the testimony of the prosecution was to the effect that soon after his arrest while under custody, the appellant

defecated 77 pellets which after the analysis it transpired that they contained chemical substance called cocaine hydrochloride. As we stated above while considering other grounds of appeal, we have no doubt that the said pellets which were admitted at the trial as exhibit P1 were not tempered at any stage of the investigation as those witnesses identified them to be the same they saw at the JNIA. In the circumstances, we find the appellant's contention in this ground wanting and accordingly dismiss it.

Lastly, in ground eleven, the appellant strongly criticizes the sentence of twenty two years imprisonment that was imposed on him by the trial court. His contention is that the trial judge did not consider his mitigation that he had stayed in custody for six years prior to his conviction. In his view, the said period could have been remitted from the sentence which was imposed. In the circumstances, he argued that as he was the first offender, the sentence is excessive. To support his argument, he referred us to the decisions of the Court in **Uhuru Jacob Ichode v. The Republic,** Criminal Appeal No. 402 of 2016 and **Willy Wolsha v. The Republic**, Criminal Appeal No. 7 of 2002 (both unreported).

The respondent/Republic's counsel submitted that the complaint of the applicant is baseless. Ms. Leopold argued that the sentence which was

imposed is consistent with requirement of the law which sets the minimum punishment to be twenty years. In her view, the term of imprisonment for twenty two years is not excessive in the circumstances of the offence the appellant was found guilty and convicted of. She thus pressed us to find that ground eleven is without justification.

It is gleaned from the record of appeal that the trial judge considered the appellant's mitigation. However, in the end she came to the conclusion that the nature of the offence compelled her to impose the said sentence.

On our part, having regard to the nature of the offence and the evidence in the record, we are of the settled opinion that the appellant being the first offender deserved a statutory minimum sentence of imprisonment for twenty years as the maximum period is life imprisonment. Thus the sentence of imprisonment for twenty two years was slightly excessive. Consequently, in the circumstances of this case in which the appellant's mitigation is that he had stayed in remand custody for six years a fact which was not disputed by the prosecution, we reduce the sentence to twenty years from twenty two years. In the event, we partly allow the eleventh ground of appeal to the extent stated above.

In the end, based on our deliberation above concerning all the grounds of appeal, save for our finding and the observation we have made

with regard to the second, ninth and eleventh grounds, we find the appeal to be devoid of merit. Consequently, we dismiss it to the extent indicated above.

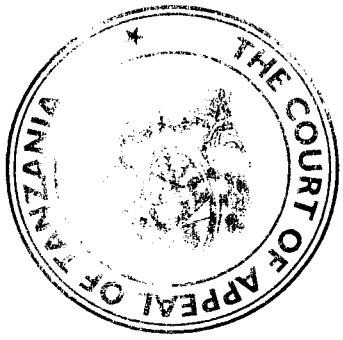
DATED at **DAR ES SALAAM** this 6th day of August, 2020

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of August, 2020 in the presence of the appellant in person - linked via video conference and Mr. Salim Msemo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL