IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 331 OF 2017

JIBRIL OKASH AHMED .....APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

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

(Luvanda, J.)

dated the 4th day of July, 2018.
In
Economic Case No. 8 of 2016

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JUDGMENT OF THE COURT

7th December,2020 & 11th February, 2021

LILA, J A:

Jibril Okash Ahmed, the appellant, and one Paulo Bana @ Kambo who is not a party to this appeal, were arraigned before the High Court of Tanzania, Arusha Sub-Registry (the trial court) for the offence of Trafficking in Narcotic Drugs contrary to section 15(1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 (DCEA) read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act, Cap 200 R.E 2002 (EOCCA) as amended by the Written Laws

(Miscellaneous Amendments) Act No. 3 of 2016. It was alleged that, on 26th February, 2017 at Kona ya Safina-Managa Street within Babati District in Manyara Region the two were found trafficking in narcotic drugs namely *Catha edulis* commonly known as *Mirungi* weighing 145.52 kilograms in a motor vehicle with Registration Number T301 BGJ make Toyota Noah. They denied the charge. Trial ensued and at its conclusion, the appellant was convicted and sentenced to serve life imprisonment. His co-accused, Paulo Bana @ Kambo was acquitted. Aggrieved, the appellant preferred the present appeal.

The prosecution paraded five witnesses and tendered nine exhibits in their guest to prove the charge. According to G. 2508 DC Mahadi (PW1), who was an investigation Police Officer, on 26th February 2017 at 11:30hrs he was on official duty at the Babati Bus Stand. He was tipped by a certain undisclosed informer that there was a motor vehicle make Noah black in color with Registration No. T 301 BGJ which was heading towards Babati carrying *Mirungi*. Accompanied by G. 35 DC Hamimu (PW2) who was at the wheel of a car, they proceeded to Kilu road where they saw that motor vehicle parked at one Mzee Naree's premises. Upon moving closer to it, that car left. They traced it up to Kona ya Safina area (Managa Street)

where a Chinese vehicle for road construction had parked on the road. They found that area to be a convenient place to stop that car. They therefore overtook it and blocked it so that it could not pass. PW1 signaled it to stop but it did not stop. Its attempt to pass over a trench failed. Instead, the car was switched off, the doors were opened and those in it disembarked and took to their heels. PW2 chased them and managed to arrest one of them who later turned out to be the appellant. In the meantime, PW1 kept watch of the car. The appellant was taken to where the car was and when PW1 and PW2 asked him why he did not obey their order to stop the motor vehicle, the appellant disclosed that they were ferrying *mirungi* to Gallapo hence were afraid of being arrested. PW1 phoned the Officer Incharge of Criminal Investigation of the District (OC-CID) one Hamis Fussi and informed him of the incident. The latter went to the scene with a seizure certificate. Search was conducted in the car and seven sacks suspected to contain *mirungi* were retrieved from the boot. The certificate of seizure (Exhibit P1) was filled at the scene and was signed by the OC-CID, (PW1) and PW2. The appellant also appended his thumb print on it. The place had no residential houses hence there was no other person. No receipt of the seized properties was issued to the

appellant. The motor vehicle which was black in colour with a silver streak at the bottom with Registration Number T 301 BGJ (exhibit P.2) was not listed in the certificate of seizure but the car and the seven sisal sacks containing mirungi were taken to Babati Police Post and later handed over the exhibit to the store keeper one Sgt Masoud (PW3) by the OC-CID. As to why the seized car was not listed in the seizure certificate, PW1 said it was because they had concentrated much on the *mirungi*. PW2, at first, told the trial court that he was approached by PW1 and informed that there was a car which he referred to as make Noah Registration Number T 301 BGI carrying *mirungi* but he later on, during cross-examination by the defence counsel, Mr. Roghat, corrected the Registration Number to be T 301 BGJ. Otherwise, he gave similar evidence to that of PW1 in respect of how the motor vehicle was traced, *mirungi* found in it and seized and that when the car stopped, people who were in it opened the doors and ran away. He said he was the one who chased the suspects and managed to arrest one of them, the appellant.

On his part, PW3 told the trial court that he is the exhibit keeper at Babati Police Station and that on 26/2/2017 at 13.00hrs he was summoned at the Police Station by the OC-CID one SP Fussi who handed over to him

seven sacks containing *mirungi* and a motor vehicle make Noah, black in colour with Registration No. T 301 BGJ and he registered them in Exhibit Register No. 31 of 2017. He also said he kept the exhibits till the 27/2/2017 when he handed the *mirungi* to DC SGT Dongoe (PW4) for taking it to the Weights and Measures Agency for weighing the same and at 10.45 hrs the same day, the latter returned them to him. He added that he kept the exhibit till the 1/3/2017 at 10.00 hrs when he gave it to PW4 for him to submit the same to the Government Chemist. Again, he said the exhibit was returned to him the same day and he kept it until on 6/2/2017 at about 10.00 hrs when he gave it to PW4 for taking it to the magistrate for seeking a disposal order. He produced and tendered a chain of custody form which indicated the handling of the *mirungi* (exhibit P.3). In respect of the motor vehicle, he said it was kept outside the police station and guarded throughout and he labeled it as exhibit 31/2017 and Case No. Babati IR 701/2017 at the bonnet until when he handed it to PW2 on the day it was taken to court.

Another witness for the prosecution was E. 3008 D/SGT Dongoi (PW4), the investigator of the case. He told the trial court that he was, on 26/2/2017, assigned the case file by the OC-CID one Hamis Fussi to

investigate. The suspect (appellant) was then in lock-up. He met PW3 who showed him the seven sacks of *mirungi* and the motor vehicle. He said he interviewed the appellant and after expressing his willingness to narrate how he committed the offence, he recorded his statement from 14.00 hrs to 17.00hrs. His attempt to have the statement admitted as evidence was objected to by the defence counsel who doubted its authenticity in that the appellant did not sign it and the time of recording was tempered with. A trial within-trial was conducted. At the end it was admitted as exhibit P.4. Explaining further, PW4 told the trial court that on 27/2/2017, the OC-CID requested an expert from the Weights and Measurement Agency to weigh the *mirungi* and one Nuru Mlowe was appointed to do the job. The appellant witnessed the exercise after PW3 had produced the *mirungi* and it was found to be 145.52 kilograms. Nuru prepared a report Ref. No. GA MNR/43/338/01/19 dated 27/2/2017 (exhibit P.5). He further said, a letter BAB/IR/701/2017 (exhibit P.6) was written to the Government Chemist Arusha Zone which was signed by the OC-CID and one Joyce Njisya went to Babati and took samples from the seven bags of *mirungi* and was handed the same through Form No. 6 (Form No. DCEA 001) which was admitted as exhibit P.7. After taking the samples, only 145 kilograms of

mirungi remained. He also told the trial court that on 6/3/2017 he took both the *mirungi* from PW3 and the appellant to the magistrate who issued a disposal order and in the company of a court clerk the *mirungi* were thrown into the pit, poured with kerosene and burnt. The Inventory Form No. DCEA 006 dated 6/3/2017 (exhibit P.8) was filled. Regarding Paulo Bana Kambo, then second accused, he said on 10/3/2017, he was told by the OC-CID that he was arrested and was in the police lock-up. However, he said, when he interrogated him, he completely disassociated himself with the accusation but admitted to be the owner of the motor vehicle which he entrusted the appellant as his driver but he said earlier on the material date, it was hired by one Ramadhani Saigulani Ramagu to attend a funeral ceremony at Mbulu.

On being cross-examined by the defence counsel, PW4 said he wrongly recorded sections 53(1) and 60(2) in the cautioned statement because the law on drugs was still new to him. As for the alterations in the time of recording, he said he was misled by the wall clock in his office. He admitted that the Registration Number of the seized car was not listed in exhibit P.3, P.6 and P.7. That a Registration Number could not be recorded in exhibit P.5 because it is for police records only. As to why it took eleven

days for the appellant to be charged, PW4 said the investigation involved different stakeholders.

The last prosecution witness was Boneventure Joka Masambu (PW5), a Government Chemist from Lake Zone. He told the trial court that on 12/6/2017, their fellow staff from Northern Zone one Joyce Njisya took to their office a sample number NZ 95/2017 which had seven envelops which according to the letter from the OC-CID Babati contained leaves suspected to be *mirungi* and they labeled it as lab. 370 and upon analysis in the presence of Joyce Njisya they found it to be *mirungi*. They prepared a report Lab. No. 370/2017 in Form No. DCE 009 (exhibit P.9). He said they received one large envelop marked A in which there were seven envelops weighing 52 grams which does not feature in the exhibit P.9. He added that 145.52 kilograms indicated in exhibit P.9 is the weight of the seized exhibit and to them an exhibit refers to the whole package although, in doing their analysis, they deal with samples taken to them only.

In his defence, the appellant pleaded innocence. He denied trafficking in narcotic drugs, the *mirungi*. He, instead, claimed that he was arrested at Mkuyuni area along the Babati – Galapo road where he had gone to seek for job in the construction company that was constructing the

road thereat. He said, while there, two motor vehicles arrived and parked. Scared, people who were around ran away and they were chased by those who were in the two cars. Further, he said, upon failure to arrest any of those who ran away, those people who were in the two cars turned against him and arrested him. He denied knowing and or appending his signature in exhibits P.1, P.4 and P.5 alleging that he was illiterate.

As shown above, the trial judge was, at the conclusion of the trial, convinced that the charge was proved to the hilt by the prosecution against the appellant. He, accordingly, convicted and sentenced him as stated above. He reasoned that the appellant, in his defence, admitted being arrested at the place where road construction was going on as stated by PW1 and PW2. Relying on the Court's decision in the unreported case of **Mohamed Haruna @ Mtupeni vs Republic,** Criminal Appeal No. 259 of 2007, he took it as a fact that the appellant's defence carried further the prosecution case. He discounted his defence that he was there looking for a job for failure to explain the kind of job he was vying for and why the police spotted and focused on him alone out of the crowd of people he alleged to have been there. The learned judge also dismissed the appellant's defence that he does not know how to drive a car on the

ground that he did not tell the means of transport he employed to get there. And, as for the allegation that he was illiterate, the learned judge found it unacceptable because the appellant appended his thumb print on the seizure certificate (exhibit P.1) which was to the effect that he admitted being found in possession of seven sacks containing *mirungi*. Based on the Government Weights and Measures Report (exhibit P.5) which showed that the *mirungi* weighed 145.52 kilograms, the Government Chemist Report (exhibit P.9) and the inventory for disposal Form No. DCEA 006 (exhibit P. 8), the learned judge was also inclined that the seven sacks contained *mirungi*.

Regarding the discrepancies in exhibit P.9, the learned judge had it that PW4 and PW5 told the trial court that the samples taken weighed 52 grams but the weight shown in the report (exhibit 9) is 145.52 kilograms which was the weight of the whole *mirungi* seized. He found it to be a minor discrepancy not affecting the substance of the Report (exhibit P9).

The learned judge also considered the discrepancy in time of arresting, search and receiving exhibits at the Police Station. The main concern was that PW1 said that the motor vehicle was seized at 11.45 hrs and search conducted at 13.00hrs whereas PW2 said that the accused was

arrested after 11.00hrs and certificate of seizure was filled at 13.00hrs. He ruled out that it was a minor defect not touching on the substance of the prosecution evidence.

The need for an independent witness in the search as was raised by the defence counsel was taken issue by the judge. He ruled out that the certificate of seizure was issued under section 48(2)(c)(v) of the DCEA which does imperatively require presence in the search and signature of an independent witness in the certificate of seizure. He added that while section 38(3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) requires a receipt showing the list of seized properties be issued, section 48(2)(c)(vii) of DCEA has no such requirement. He, again, discounted the cautioned statement for having been recorded out of the four hours prescribed by law and on account of alterations effected on it.

In the end the learned judge found the appellant guilty, convicted and sentenced him as stated above.

The conviction and sentence aggrieved the appellant. He preferred this appeal seeking to assail the High Court finding and sentence upon a memorandum of appeal comprising twelve (12) grounds which read;

1. *That the judge grossly erred in law and fact to admit in evidence motor vehicle Registration No. T301 BGJ which procedures of its seizure and production in court were grossly violated.*
2. *That the honorable trial judge grossly erred in law and fact to hold that motor vehicle Registration No. T301 BGJ make Noah was used to transport Mirungi on the date of incident while the witness from the Republic totally failed to show where exactly in the said motor vehicle Mirungi were kept and if it had capacity to carry the alleged quantity of Mirungi.*
3. *That the trial judge grossly erred in law and fact for failure to see that authenticity of motor vehicle Registartion No. T301 BGJ was doubtful and questionable hence wrongly relied on this exhibit to convict the appellant.*
4. *The trial court grossly erred in law and fact for its failure to see that chain of custody in respect of Mirungi and motor vehicle with Registration No. T301 BGJ was broken and mishandled by the Republic thereby wrongly (sic) convicted and sentenced the appellant as charged.*
5. *That the trial judge grossly erred in law and fact to convict the appellant of the offence of trafficking narcotic drugs while there is no credible evidence on record which proved that the appellant actually knows how to drive.*
6. *That the honorable judge grossly erred in law and fact to admit and give weight to certificate of seizure (Exhibit P1)*

which was taken without having independent witness particularly a civilian.

7. *That the trial judge grossly erred in law and fact to accord weight and relying on exhibits P5 and P8 which were taken while the appellant was in custody beyond the prescribed time limit of 24hrs and no extension of time was sought as directed by the law.*
8. *That the honourable trial judge grossly erred in law and fact for failure to draw adverse inference against the prosecution's case for failure to call the material witness to wit; ASP Hamis Fussi Ramadhani, Nuru Mlowe and Joyce Njisya who alleged to prepare and execute exhibits P1, P5 and P9, respectively.*
9. *That the honourable trial judge grossly erred in law and in fact for his failure to adequately and properly address the contradictions that appeared in the prosecution case and give the appellant benefit of doubt.*
10. *That the honourable trial judge grossly erred in law and in fact for placing burden of proof on the part of the appellant instead of the Republic as required by the law hence wrongfully (sic) convicted and sentenced the appellant with (sic) the offence charged.*
11. *That the learned trial judge grossly erred in law and fact for his failure to make proper analysis and evaluation of the evidence thereby occasioned miscarriage of justice on part of the appellant*

12. That the trial judge erred in law and in fact to hold that the offence which the appellant stood charged was proved by prosecution beyond reasonable doubt.

The appellant, who was also present before us, had the services of Mr. Robert Roghat, learned advocate, who also represented him at the trial. On the other hand, Ms. Janeth Sekule, Ms. Sabina Silayo and Ms. Tusaje Samwel, learned State Attorneys teamed up to represent the respondent Republic.

For the sake of convenience in arguing the grounds of appeal, Mr. Roghat opted to divide the above grounds of appeal into four groups. Grounds 1, 2, 3, and 5 formed the first group, grounds 4, 6, 7 and 8 were part of group two, grounds 9, 10 and 11 formed the third group and the last group constituted ground 12.

The central issues addressed by Mr. Roghat in arguing grounds 1, 2, 3 and 5 which generally touched on the handling of the motor vehicle were that; **first,** the motor vehicle (exhibit P2) in which it was alleged that the seven sacks of *mirungi* were found, was illegally seized because it was not listed in the seizure certificate (exhibit P1), **second**; the High Court improperly exercised its discretion to admit the seizure certificate (exhibit

P1) as exhibit in terms of section 169(2) of the CPA, **third**; section 138(3) of the CPA was not complied with for want of an independent witness and failure by the seizing police officers to issue a seizure receipt to the appellant showing the properties seized, **fourth**; the motor vehicle (exhibit P2) was not properly identified by the prosecution witnesses and **fifth**, the witnesses did not show in which part of exhibit P2 were the *mirungi* hidden.

Amplifying on the above complaints, Mr. Roghat argued that there was no evidence showing how exhibit P2 was seized because the seizure certificate (exhibit P1) listed the seven sacks of *mirungi* only. The omission to list exhibit P2 meant that it was not involved in the commission of the charged offence. He argued further that the defence side objected to the admission of the car as exhibit but the trial court wrongly exercised its discretion under section 169(1) and (2) of the CPA to admit the same as an exhibit. He insisted that since exhibit P2 was not listed in the seizure certificate and the requirements of section 169(2) of the CPA were not complied with, then its admission as an exhibit was faulty. He assailed the judge's view that it was a minor oversight on the part of the police officers for not listing exhibit P2 in the seizure certificate. He urged the Court to

expunge it from the record. Mr. Roghat also attacked the learned trial judge for relying on the testimonies of PW1 and PW2 who did not lead any evidence showing where exactly were the alleged *mirungi* found in exhibit P2. To him it was not sufficient to say that the *mirungi* were kept in the boot. Further to that, he argued that exhibit P2 was identified by mere generic features only, that is the make, Registration Number and the colour. He stressed that production of a Registration Card which could show not only the owner but also the engine number was necessary. Worse still, he argued, even the make and the Registration Number told by the witnesses differed. For instance, he said PW2 at page 78 said it was Registration Number T301 BGI while PW1 at page 79 said it was Registration Number T 301 BGJ and, while the witnesses said it was make noah, exhibit P6 recorded it as Toyota Hiace. In connection with the appellant's arrest, Mr. Roghat argued that no evidence was led to prove that he knew how to drive the motor vehicle. On these anomalies, Mr. Roghat argued that the trial court wrongly relied on such evidence to convict the appellant.

Singling out ground 4 of appeal and arguing it somehow with special vigour, Mr. Roghat argued that the chain of custody of both *mirungi* and

the motor vehicle (exhibit P2) was broken. According to him, PW3 did not show how exhibit P2 was handled because he tendered no evidence showing that it was under his custody because the store register was not produced in court as exhibit. As for *mirungi*, he argued that the paper trail tendered did not show the signatures of those who took and returned them to and from the store. He added that even after Joyce Njisya had taken samples from the sacks, there was no indication in the paper trail that the weight of *mirungi* handed back to PW3 was less. He further argued that while the *mirungi* were weighed on 27/2/2017, exhibit P3 which was prepared on 26/2/2017 showed that the weight was 145.52 kilograms. He wondered how could the weight of *mirungi* be known a day before it was weighed. Directing his arsenals on exhibit P9, Mr. Roghat took issue with whether the samples of *mirungi* were taken by Joyce Njisya at Babati as stated by PW4 or the same was sent to her at Arusha and whether it were the samples only which were taken to Arusha or the whole lot of the *Mirungi* seized (145.52 Kilograms) as indicated in exhibit P9.

In respect of ground 6 of appeal, Mr. Roghat argued that section 48 of the EOCCA and section 38 of the CPA are *in pari materia* and they imperatively provide for the need for an independent witness to participate

in the seizure and sign the seizure certificate. However, on reflection, he retreated and said the need for an independent witness is not provided for in those provisions but by case law. He referred us to the Court's decision in the case of **David Athanas @ Makasi and Another vs Republic**, Criminal Appeal No. 168 of 2017 (unreported). He urged the Court to expunge exhibit P1 from the record.

In ground 7 of appeal, Mr. Roghat submitted that weighing of *mirungi* and disposal of the same as evidenced, respectively, by exhibits P5 and P8 were done while the appellant was in prison where he had stayed for a couple of days. He implored us the consequences of recording a cautioned statement outside the prescribed period of four hours from the time of arrest as provided under sections 50 and 51 of the CPA be extended and hold that the two exhibits were improperly secured and acted on hence they should be expunged.

Arguing in respect of grounds 9, 10 and 11 of appeal, Mr. Roghat complained that the learned trial judge overstepped the cardinal principle in criminal justice by shifting the burden of proof to the appellant. He capitalized in the learned judge's statement in the judgment at page 198 of the record that the appellant failed to explain the means of transport he

used to arrive at the place where he was arrested. In support of his contention he cited the case of **Maulid Juma Bakari @ Damu Mbaya and Another vs Republic**, Criminal Appeal No. 58 of 2018 and **Mapambano Michael @ Mayanga vs Republic**, Criminal Appeal No. 268 of 2015 (both unreported).

In ground 8 of appeal, Mr. Roghat sought to move the Court to draw an adverse inference to the prosecution case for not calling as witnesses those people who played very crucial roles in the case namely; the OC-CID one Hamisi Fussi who executed exhibit P1, Nuru Mlowe who weighed and executed exhibit P6 and Joyce Njisya who took samples of *mirungi* to the Government Chemist, participated in analyzing the same and executed exhibit P9. Failure to call them to testify, Mr. Roghat argued, denied the defence opportunity to seek clarification from them on what they did in connection to the case. For instance, he submitted, Hamis Fussi would have explained how seizure was conducted and the type of motor vehicle seized. That omission, he argued, entitled the trial court to draw an adverse inference against the prosecution case and hence acquit the appellant. In sum and based on the aforesaid deficiencies, Mr. Roghat urged the Court to allow the appeal and order the appellant be set free.

Ms. Sekule, strongly resisted the appeal. Save for grounds 2 and 3 of appeal and grounds 1, 9, 10, 11 and 12 of appeal which she preferred to argue jointly, she opted to argue the rest of the grounds of appeal separately.

Starting with grounds 1, 9, 10, 11 and 12 of appeal, Ms. Sekule argued that there is sufficient evidence by PW1 and PW2 who are the arresting officers that the appellant was arrested by PW2 when he attempted to run away from the motor vehicle make Noah in which seven sacks of *mirungi* were found. She, however, conceded that the motor vehicle was not listed in the seizure certificate (exhibit P1) as being one of the properties seized. She was at one with the learned trial judge that it was a minor oversight on the part of police which did not prejudice the appellant. In respect of tendering and admission of exhibit P1, she also conceded that the defence objected to the prayer but the learned judge rightly exercised his discretion under section 169(1) of the CPA to admit the same as exhibit. That, according to Ms. Sekule, can be deduced from the fact that the learned judge admitted it for what he termed as the interest of justice. However, when the Court drew her attention to the provisions of section 169(2) of CPA which stipulate the conditions to be

observed by the trial judge in exercising his discretion under section 169(1) of the CPA, she changed her position and readily conceded that all the conditions stipulated therein were not conjunctively complied with hence exhibit P2 ought to be expunged from the record.

Turning to whether exhibit P2 was properly identified, Ms. Sekule argued that identification by make, Registration Number and colour was sufficient. Connected to this, she argued that although PW2, at first, wrongly said Exhibit P2 was Registration Number T301 BGI, he corrected the mistake later during examination in chief. More so, she argued that PW1 and PW2 were firm that the seven sacks of *mirungi* were found in the boot of the motor vehicle (exhibit P2) hence the fact that they did not show the boot when they were asked to identify the motor vehicle was inconsequential.

In addressing the issue of chain of custody of both *mirungi* and the motor vehicle, Ms. Sekule submitted that it was not broken. She contended that there is clear evidence by both PW1 and PW2 that after the arrest and seizure, both the motor vehicle and *mirungi* were taken to the police station and handed over to the store keeper (PW3). That, according to PW3, the motor vehicle was labeled with the case number and was never

taken out until when it was produced in court during trial while the movement of the *mirungi* was well recorded in the chain of custody form (exhibit P3). She insisted that there was no room for tempering with the exhibits. Regarding failure to indicate reduction of weight of *mirungi* in the chain of custody form after Joyce Njisya had taken samples therefrom, Ms. Sekule countered that it had no effect given the fact that the seven sacks of *mirungi* were returned to PW3 for custody. Responding to the issue that no evidence was led by the prosecution to prove that the appellant knew how to drive, she said it was immaterial whether or not the appellant knew how to drive. The crucial fact is that he was in the car that carried *mirungi* and that upon his arrest he admitted not obeying the police order (PW1 and PW2) to stop because they had carried *mirungi* in the car, she insisted.

Responding in respect of ground 6 of appeal that section 48 of the DCEA and section 38 of the CPA are *pari materia* and provide as a necessity that there must be an independent witness in the search who should also sign the seizure certificate, Ms. Sekule refrained from going along with the arguments by Mr. Roghat arguing that they are different and neither of them provides for the need for an independent witness to be present during the search and signing of the seizure certificate.

Elaborating, she argued that section 48 of DCEA makes no mention of a witness to the search while section 38 of the CPA leaves it open that if there is one then he can witness and sign the seizure certificate. Based on that, she fully supported the position taken by the learned trial judge that there was no need for an independent witness to witness and sign the seizure certificate.

In respect of Mr. Roghat's invitation to the Court to either extend or seek inspiration from sections 50 and 51 of the CPA and declare exhibits P5 and P8 invalid for being prepared beyond four hours, Ms. Sekule strongly urged the Court not to accept it. She pressed that the cited provisions apply in recording an appellant's cautioned statement and require the same be done within four hours after arrest unless time is extended by either the In-charge of a police station or a magistrate. To the contrary, she argued, exhibits P5 and P8 were outcomes of the exercise in which the appellant was fully involved and appended his thumb print to the reports thereof.

Responding in respect of ground 8 of appeal, the learned State Attorney was not in agreement with Mr. Roghat that the crucial witnesses were not summoned to testify. Putting much on section 143 of the Evidence Act, Cap. 6 R. E. 2019 (the EA), she pointed out that no certain

number of witnesses is required to prove a fact and that the witnesses who testified were credible, had knowledge of what they testified on and were custodian of the exhibits which they tendered and admitted as exhibits and their testimonies and exhibits were not challenged.

Lastly, briefly but focused, Ms. Sekule responded to grounds 9, 10, 11 and 12 of appeal which touched on the complaints that there were contradictions in the prosecution witnesses' testimonies, failure to address, analyze and evaluate the prosecution evidence as well as shifting the burden of proof. She argued that they are without merit. She contended that there are no serious contradictions which go to the root of the case. She argued that they were considered by the learned trial judge and he was satisfied that they were unable to quiver the all solid evidence by the prosecution. She, finally, argued that the findings of the learned judge were based on his proper analysis and evaluation of the evidence by both sides hence cannot be faulted. She prayed the appeal be dismissed in its entirety.

In rejoinder, Mr. Roghat argued that the evidence by PW1 and PW2 suggested that the appellant was a driver hence there was need for the prosecution to prove that allegation. In respect of section 48 of DCEA and

section 38 of the CPA, he contended that although they don't expressly provide that there must be an independent witness in conducting search, the interpretation given in the case of **David Athanas @ Makasi** (supra) stressed on that. In conclusion, he implored us to allow the appeal and set the appellant free.

We have dispassionately examined the evidence on record and also given a deserving weight to the arguments by the learned counsel for the parties to this appeal. As opposed to the course taken by the learned counsel of the parties in arguing the appeal, we will adopt our own mode in considering both the grounds of appeal and the arguments thereon in the determination of this appeal. So, save for a few issues we shall consider crucial which shall be considered and determined separately, we shall consider the grounds of appeal generally because the issues involved overlap each other and are intertwined. Definitely, in the due course all issues raised will be determined although not in the chronology adopted by either counsel.

Having said the above, we propose to, first consider the ensuing issues which came to the limelight in the course of arguing the appeal. These are, **one**, whether the motor vehicle (exhibit P2) was properly

identified, **two**, whether there were contradictions in the prosecution witnesses' evidence and, if any, went to the root of the case, **three**, whether there was need to prove that the appellant knew how to drive a car, **four**, whether the prosecution witnesses failed to tell where exactly were the *mirungi* put in the motor vehicle.

In the first place, from the evidence on record, it seems clear to us, as was the case with the learned trial judge, that the appellant did not dispute that the seven sacks of *mirungi* were found in the motor vehicle. In very clear terms, in his defence, the appellant told the trial court that while he was at the place he said to have been looking for a job, he saw two motor vehicles moving in his direction and stopped. He said he was thereafter arrested and taken to police station. PW1 and PW2, the arresting officers, told the trial court that the latter arrested the appellant after making a short chase when he disembarked from the said car and took to his heels. We shall come back to this at a later stage of this judgment.

Regarding the identification of exhibit P2, PW1 and PW2 told the trial court that they chased the said car right away from Kilu road where it had parked at one Mzee Nadee's premises to where it stopped at Kona ya

Safina Street. They said the car was make Noah, Registration Number T 301 BGJ with silver streak at the bottom. These were the descriptions they gave before being shown the motor vehicle and actually were the ones noted on the car. We think, like the learned State Attorney, those marks were peculiar and sufficient in identification. Much as the production of the Registration Card which tells the rightful owner and the engine number are other ways of identifying a motor vehicle, failure to do so does not, in our view, affect identification. They would only add value to the mode of identification. We, therefore, agree with the learned State Attorney that exhibit P2 was properly and sufficiently identified.

The record, as rightly observed by Ms. Sekule, bears out that the learned trial judge appreciated the existence of various contradictions and discrepancies in the prosecution evidence but discounted them as being minor. Mr. Roghat, has, again, brought them to the fore seeking the Court's indulgence and hold that they are serious and go to the root of the case. At page 198 of the record (page 8 of the impugned judgment), the learned judge discussed the inconsistences in exhibit P9 pertaining to the weight of *mirungi* and had this to say:

"There was minor discrepancy in exhibit P9 regarding (sic) weight of (sic) sample taken and analyzed. PW4 and PW5 said the sample taken had a weight of 52 grams, but exhibit P9 show it's (sic) weight is 145.52 kilograms, which is the actual weight of the whole exhibit of mirungi seized. According to PW5 stated that probably it was a typing error, as Joyce Njisya had measured weight of the whole exhibit of mirungi at Babati police, which fact was also deposed by PW4. As such I take it as a minor discrepancy which does not distort the whole report. In the premises, the report exhibit P9 sail through and is ruled to be a competent report, with reference to the subject matter of plants or leaves submitted for analysis. My verdict is based on a fact that, there is no evidence to suggest that the sample (sic) taken were not analyzed at all or had a (sic) different results."

It is now trite law that minor contradictions, inconsistencies and discrepancies by any particular witness or among witnesses do not corrode the credibility of a party's case while material contradictions and discrepancies do [See **Dickson Elia Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007 (unreported)]. Having seriously

examined the evidence on record, we think the learned judge's finding that the contradictions are minor is legally sound. PW4 clearly told the trial court that samples from each of the seven sacks were taken by Joyce Njisya weighing 52 grams. In that regard, PW5 whom the samples were taken by Joyce Njisya for analysis told the trial court that the seven samples were in seven envelopes but the analysis report (Exhibit P9) should show the weight of the whole exhibit seized. This is what he is recorded to have told the trial court at page 128 of the record of appeal when he was re-examined by Ms. Msawa, learned State Attorney:

> *"That exhibit was brought by Joyce Njisya and was contained in a large envelope. To us an exhibit refers to the whole package, but in analysis we conduct in respect of each sample brought. So far the one who participated in sampling is Joyce Njisya, she participated also in measuring its weight, that is why 145.52 is reflected."*

No doubt the above evidence not only sufficiently explains away the discrepancy in exhibit P9 complained of but also clears out all the reasonable doubts linked with it. All that is said is that, the samples taken for analysis represented the whole lot that is 145.52 kilograms of *mirungi* that were seized. In actual fact PW5's testimony also provides an answer to

the concern raised by Mr. Roghat whether 145.52 kilograms of *mirungi* were taken to the Government Chemist. It is clear that Joyce Njisya took only seven samples from each of the seven sacks of *mirungi* at Babati as was stated by PW4. Following the explanation given by PW5, simply stated, there were no discrepancies in exhibit P9.

We now turn to consider the issue whether there was need to prove that the appellant knew how to drive a car. In the first place the evidence on record by PW1 and PW2 did not show that the appellant was the driver of the motor vehicle that carried *mirungi.* Nor can it be inferred therefrom that he was the driver. All that was said is that upon being stopped, the car engine was switched off and two persons disembarked from it and ran away and that while PW1 kept watch of the car, PW2 ran after the appellant whom he managed to subdue and arrest. The appellant was in the car that carried *mirungi* and in giving an account as to why they did not stop he said they had carried *mirungi.* That evidence sufficiently proved possession thereof. On that accord, we share the view taken by the learned State Attorney that knowing how to drive is immaterial in proving the offence. This complaint is therefore baseless.

Location of *mirungi* in the motor vehicle at the time of arrest was taken issue by Mr. Roghat in this appeal arguing that the prosecution witnesses who identified the motor vehicle did not show where exactly the seven sacks of *mirungi* were kept in the motor vehicle. He said mere stating, during their testimony, that they were in the boot of the motor vehicle was not enough. We, to say the least, don't share views with Mr. Roghat. The reason is simple that the witnesses were called upon to identify the motor vehicle not to show where the seven sacks of *mirungi* were kept. They were done with that when they told, during their respective testimonies, that they found them in the boot of the motor vehicle when it was opened. That was enough for; even the defence did not challenge or seek more clarification in the event that it was not clear by way of cross-examination. Raising that argument at this stage, no doubt, is an afterthought.

The complaint on the chain of custody in ground 1 of appeal that it was broken is two-limbed. **First**, it is in respect of the motor vehicle and, **second,** it concerns the *mirungi*. Starting with the motor vehicle, it was, indeed, conceded by PW1 and PW2 during cross-examination that it was not recorded in the seizure certificate (exhibit P1). Even the learned State

Attorney readily conceded to that deficiency before us. She, however hurriedly agreed with the learned trial judge that it was a mere oversight by the police who filled the seizure certificate. We think this is a non-issue. We have indicated above that the appellant did not dispute the motor vehicle make Noah being stopped closer to him at a place he claimed to have been looking for a job. We have also held above that there is sufficient evidence that the seven sacks of *mirungi* were found in the boot of that motor vehicle. The issue here is how were the seven sacks of *mirungi* and the motor vehicle handed over before being produced in court as an exhibit.

Before dwelling on the issue of chain of custody, we think we should, at first, consider the admission of the motor vehicle as exhibit P2. As shown above, its admission was objected to by the defence but, exercising his discretion under section 169(1) of the CPA, the learned trial judge admitted it on the ground that it was for the interest of justice. That finding is being challenged herein. For ease of reference and clarity, we wish to quote the provisions of section 169(1) and (2) of the CPA as hereunder:

"169 – (1) where in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence, it is satisfied as required by subsection (1) include:-

a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

b) the nature and seriousness of the contravention or failure; and

c) the extent to which the evidence that was obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained."

Closely considered, it is apparent that the learned judge considered the requirement of section 169(1) only. He never had an eye on the requirements of section 169(2) which sets the conditions to be observed in the event the learned judge was inclined to exercise his discretion under section 169(1). We need not overemphasize that the conditions stipulated under section 169(2) provide for the scope within which the judge is to exercise his discretion. Definitely, the way that section is couched suggests that those conditions should not only be conjunctively complied with but are also not exhaustive. That is clear from the words "*the matters that the court may have regard to in deciding....**include**...*" That said, without any hesitation, we agree with Mr. Roghat that the admission of the motor vehicle as exhibit P2 was done in total disregard of the requirements of the provisions of section 169(2) of the CPA, hence flawed. The same is hereby expunged from the record. This does not, however, as demonstrated above, affect the fact that the motor vehicle was used in transporting the

mirungi. In the circumstances, the discussion on chain of custody of the motor vehicle (exhibit P2) turns out to be of no relevance to the conviction for the charged offence.

Now, we deal with the chain of custody of the seven sacks of *mirungi*. As a starting point we wish to state that it is settled law that in cases involving arrest, seizure, custody and later production in court of the seized property as exhibit, there must be proper explanation of who and how the property was handled from where it was found and seized up to the point when it is tendered in court. That is intended to ensure authenticity of such evidence. The Court has consistently taken that position right from the case of **Paulo Maduka and 3 Others vs Republic**, Criminal Appeal, No. 110 of 2007, **Abuhi Omari Abdallah and 3 Others vs Republic**, Criminal Appeal No. 28 of 2010 and **Kashindye Bundala vs Republic**, Criminal Appeal No.32 of 2014 (unreported). Further and recently, the Court lucidly expounded the legal principles governing chain of custody in the case of **Chacha Jeremiah Murimi and 3 Others vs Republic**, Criminal Appeal No. 551 of 2015 where it stated that:-

"In establishing chain of custody we are convinced that the most accurate method is on documentation as stated in ***Paulo Maduka and Others vs. R.,*** *Criminal Appeal No. 110 of 2007 and followed in* ***Makoye Samwel @ Kashinje*** *and* ***Kashindye Bundala,*** *Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in* ***Paulo Maduka*** *(supra) would be relaxed."*

The Court went on to state that:-

"In the case of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported), the appellant challenged the chain of custody of a motorcycle. In differentiating the chain of custody in respect of exhibits which can change hands easily and those which cannot, this Court stated at pp.18-19 of the typed judgment:

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

We shall subject the evidence on record to the above principles in determining whether the chain of custody of *mirungi* was broken as complained by Mr. Roghat.

We have given due consideration to the evidence on record by both sides and arguments of the respective learned counsel before us. Admittedly, the learned trial judge did not address himself to the issue of chain of custody. Instead, his discussions centered on the seizure certificate and the need for an independent witness to witness the search and sign the seizure certificate. The record is clear that no paper trail

establishing how the *mirungi* reached PW3 (the store keeper – PW3). However, PW1 and PW2 clearly told the trial court that after seizure, the *mirungi* were taken to the police station and handed to PW3 by Hamisi Fussi, the OC-CID. PW3, on the other hand, confirmed that fact. That, in our view, on the above authorities, was sufficient explanation on how the seven sacks of *mirungi* were handled. The handling of the *mirungi* between PW3 and PW4 when the Weights and Measuring Officer one Nuru and one Joyce Njisya from the Government Chemist were called to weigh the *mirungi* and take samples for analysis, respectively, was documented in the chain of custody form (exhibit P3). In addition PW4 offered an acceptable explanation on how the *mirungi* were disposed after obtaining an order to that effect from the primary court magistrate in which exercise the appellant was fully involved. We, in the circumstances, agree with the learned State Attorney that despite there being no documentation of how the OC-CID handed over the *mirungi* to PW3, there was sufficient evidence on how the OC-CID handed over the mirungi to PW3. Nothing suggests that there was room for tampering with the *mirungi*. Even the defence did not lead evidence to the contrary. The chain of custody was therefore not broken. This complaint is therefore without merit and is dismissed.

The need for an independent witness in conducting the search and signing of seizure certificate is another area complained by Mr. Roghat. It is an obvious fact that an independent witness is important because he is able to provide independent evidence. However, for that requirement to be absolute and indispensable, it should be backed by law. In the present case, the learned trial judge discussed sections 48(2)(c)(vii) of the DCEA and 38(3) of the CPA and found that the former does not imperatively provide for the need of an independent witness while the later requires an independent witness to sign the seizure certificate if present. That is the legal position. For avoidance of doubt, we hereunder reproduce the relevant sections:-

Section 48(2)(c)(vii) of DCEA provides:

> *"Searches for an article used or suspected to have been used in commission of an offence shall:*
> *(vii) record and issue a receipt or fill in the observation form an article or thing seized in a form set out in the third schedule to this Act."*

Section 38(3) of the CPA provides that:-

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer*

seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of the witness to the search, if any."

Closely examined, it is apparent that section 48(2)(c)(vii) of DCEA in no uncertain terms does not require the signature by an independent witness. Instead, it requires the report on the seized thing be filled in the observation form set out in the schedule to the Act, that is Form No. DCEA 003. In the present case, the report on the seized *mirungi* was filled in Form No. DCEA 003 (exhibit P1). That form shows that witnesses to the seizure and the executing officer have to sign but does not show that there should be an independent witness. Moreover, that provision imposes a duty on the arresting officer to issue a receipt. Ms. Sekule readily admitted that no receipt was issued. We however don't think that such an anomaly affects the substance of the seizure certificate. The omission or contravention is minor and, legally speaking, cannot invalidate the seizure certificate or affect its admissibility or even cause it to be expunged from the record. On that we are reinforced by our finding in the case of

Nyerere Nyague vs. The Republic, Criminal Appeal No. 67 of 2010 where it we stated that;

> *"It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question."*

Conversely, read closely, section 38(3) of the CPA leaves it open for any witness to the search to sign the seizure certificate. Since the seized thing was drugs and the law applicable was the DCEA, then it was proper and sufficient to fill Form No. DCEA 003 (exhibit P1) which did not require the presence and signature of an independent witness. That said, the case of **David Athanas vs Republic** (supra) relied on by the defence was decided according to its material facts. In that case, the appellant was charged with unlawful possession of government trophy and section 38(3) of the CPA was discussed because the case concerned seizure of government trophies to which the CPA applied. In addition, in that case the search was conducted at Chinangali, Dodoma and the certificate of seizure was signed at Manyoni, Singida. The Court insisted that the certificate of seizure ought to have been filled and signed at Chinangali where seizure was effected. So, apart from the facts being different, the law applicable

was also different. The finding of the Court in the cited case, for that reason, has no any bearing to our present case.

The last and crucial issue to consider is whether the prosecution evidence established that the appellant committed the charged offence beyond doubt?

As earlier on indicated, the appellant, in his defence, flatly denied any involvement in the commission of the charged offence. He associated his arrest and implication in the commission of the offence with his unfortunate presence at the construction company area seeking for a job when the motor vehicle make Noah was stopped and seized by police. Such defence was duly considered by the learned judge and we agree with his observation that by such defence the appellant conceded being arrested at the scene of crime and on the authority of cited case of **Mohamed Haruna @ Mtupeni vs Republic** (supra) carried further the prosecution case. His plea that he was arrested after PW1 and PW2 had failed to arrest the person they intended to arrest was dismissed by the learned judge on the ground that he did not explain the means of transport he used to reach at that place, kind of job he was looking for and why the police spotted him if there were other people at the place. Much as we

agree that those observations by the learned trial judge amounted to shifting the burden of proof to the appellant, but given the testimonies of PW1 and PW2 on how the appellant was arrested, there was need for the appellant to lead evidence that would shake the prosecution evidence. It was the testimonies of PW1 and PW2 that upon stopping the car, the car engine was switched off and two people disembarked and ran away but PW2 ran after the appellant and managed to arrest him. PW1 and PW2 were insistent that there were no other persons thereat and the appellant ran into a nearby maize farm. It was during the day time, that is at between 11.30 a.m and 1200 noon and there is no indication that PW2 lost sight of the appellant when he disembarked from the car and when chasing him. The Court has taken the position that where an accused person is chased from the scene of crime even in difficult condition such as at night time without losing sight of him and is successfully arrested, that is sufficient evidence that he is responsible with the commission of the offence [see **Abdalla Bakari vs Republic**, Criminal Appeal No. 268 of 2011 cited in **Joseph Safari Massay vs Republic**, Criminal Appeal No. 125 of 2012 (both unreported)]. In the present case PW2 saw the appellant disembarking from the car, chased him and arrested him not far

from the scene after a hot pursuit. More so, upon being taken to where the car was parked and interrogated why they did not stop when so ordered, he said it was because they had carried illegal consignment of *mirungi*. That evidence was corroborated by PW2. That was confession before a police officer which is, under section 27 of the EA, admissible. The appellant also appended his signature (thumb print) on the observation Form No. DCEA 003 (exhibit P1). Such witnesses were not doubted by the learned trial judge and we see no cogent reason to doubt them. That aside, the appellant's conduct, that is running away from the scene of the crime was inconsistent with innocence [See **Eliya Kundaseni Shoo vs Republic**, Criminal Appeal No. 288 of 2015 (unreorted)]. All these circumstances and evidence considered leave no doubt that the prosecution evidence impeccably established the appellant's involvement in the commission of the offence. This being the case, we entirely agree with the learned State Attorney that the prosecution's failure to call Hamis Fussi, Nuru Mlowe and Joyce Njisya as witnesses did not affect the prosecution case, for, those who testified sufficiently proved to the hilt the charge against the appellant. Nor is there any indication that appellant was

affected or prejudiced by such failure since no question was left unanswered.

Lastly, we consider the invitation by Mr. Roghat to extend the application of sections 50 and 51 of the CPA in the present situation and declare as illegal all that was done when the appellant was in police custody. It is his contentions that the seven sacks of *mirungi* were weighed and disposed of by order of the primary court magistrate before the charge was laid against him. The record of appeal bears out that the appellant was first taken to court on 13/3/2017 and according to the charge sheet and evidence by PW1 and PW2, he was arrested on 26/2/2017. Much as we agree with Mr. Roghat that the appellant was not promptly charged, yet sections 50 and 51 of the CPA concern the time for recording of cautioned statement to be within four hours from the time of arrest. Unfortunately there are no similar provisions in the DCEA for weighing and disposal of seized items. Even if there was delay in being charged, yet according to PW1 and PW2, the appellant was involved and witnessed both the weighing and disposal of the seven sacks of *mirungi*. His rights of participating and being involved in the dealings with the exhibit as were expounded by the Court in the case of **Mohamed Juma @ Mpakama vs**

Republic, Criminal Appeal No. 385 of 2017 (unreported) were fully observed. He appended his thumb print in the disposal of exhibit Form No. DCEA 006 (exhibit P8). He was thereby not prejudiced. That much, we do not find it proper to extend applicability of such provisions as proposed by Mr. Roghat. Accordingly, the invitation extended to us by Mr. Roghat is hereby refused.

All said, this appeal is without merit. It is hereby dismissed.

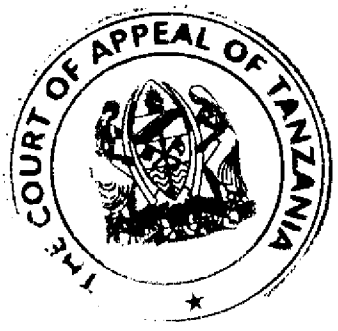
DATED at **DAR ES SALAAM** this 4th day of February, 2021

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered on this 11th day February, 2021, in the presence of appellant in person - linked via video conference at Arusha Central Prison and Ms. Mary Lucas, State Attorney for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL