IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A, MWANDAMBO, J.A AND KEREFU JA.)

CRIMINAL APPEAL N0. 67 OF 2019

REMMY GERALD SIPUKA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salam)

(Matupa, J.)

dated the 15th day of March, 2019
in
Economic Case No. 05 of 2018

.....

JUDGMENT OF THE COURT

3rd May & 28th July 2021

MWANDAMBO, J.A.:

The Economic Crimes Division of the High Court of Tanzania sitting at Dar es Salaam convicted Remmy Gerald Sipuka, the appellant of the offence of trafficking in narcotic drugs and sentenced him to life imprisonment. The conviction was preceded by a trial predicated on an information in which the appellant and Amina Juto Juma who is not a party to this appeal were alleged to be trafficking in narcotic drugs contrary to section 15 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015 (the Act) read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200

R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

The particulars in the information alleged that on 6th October, 2017 at Ilala Sharifu Shamba, within Ilala District, Dar es salaam Region, the appellant and Amina Juto Juma (DW2) were found trafficking in narcotic drugs to which they pleaded not guilty and hence their trial. The High Court was satisfied that the prosecution had proved its case to the required standard against the appellant resulting into his conviction. DW2 was acquitted due to unsatisfactory evidence to prove the case against her. Aggrieved, the appellant has preferred the instant appeal against both conviction and sentence.

The arraignment of the appellant and DW2 was triggered by a tip from an informer conveyed to SSP Salmin Shelimo of the Drugs Control and Enforcement Authority (DCEA) alleging that the duo was involved in trafficking of narcotic drugs. From that information, SSP Shelimo detailed Officers from DCEA led by Inspector Daniel Mtewele (PW5) assisted by Inspector Wamba (PW7) to make a follow up on the issue.

On the night of 6/10/2017, a team of police officers led by PW5 assisted by PW7 conducted a search at the appellant's house from which

a nylon paper bag was allegedly retrieved containing powdered substance weighing 219.45 grams suspected to be narcotic drugs namely; Heroin Hydrochloride.

The case for the prosecution was built on seven witnesses three of whom were police officers whose evidence stand out conspicuously namely; PW5, PW7 and SP Neema Mwakagenda (PW3). The substance of the evidence of the prosecution witnesses which the trial court found sufficient to prove the case against the appellant run as follows: The appellant and Amina Juto Juma, the second accused (DW2) had intimate love relationship out of which they had a child. On the night of 6th October, 2017, DW2 was at the appellant's house at Sharifu Shamba area, Ilala District. At midnight, the duo and other occupants in that house which included Thomas Heman Mwanga (DW3), were woken up by a knock from the gate of the house. The knock was triggered by Police officers from DCEA that is to say; PW5 accompanied by PW7 and WP DC Witness and other junior Police Officers.

The police officers were on a mission to conduct a search in the appellant's house acting on an information conveyed by an informant to SSP Shelimo in connection with trafficking in narcotic drugs. In response, the appellant obliged together with DW2 and DW3. Upon

introductions and explanation of their mission, PW5 and his team put the appellant and DW2 under arrest before conducting a search which entailed enlisting the involvement of Selemani Ndagala (PW6), a local ten cell leader as an independent witness. The manner in which the independent witness was sourced is not entirely straight forward but it is common ground that PW6 witnessed the search in the appellant's house notably, the bed room in the presence of the appellant.

It is noteworthy that PW6 was declared hostile by the trial court. Needless to say, the key people involved in the search were WP DC Witness and PW7 as her immediate supervisor. There was little contest that the two alternated in conducting the search whilst PW5; the overall in charge stood by the door of the room supervising the search. In the course of the search conducted in the appellant's room, PW7 is said to have spotted a transparent nylon bag overhanging in one of the branches of a wooden stand used to hang ladies' handbags. According to PW5 and PW7, the nylon bag contained a powder substance suspected to be narcotic drugs. That substance was later on sent to the Chief Government Chemist for analysis. The search team retrieved other items from the appellant's room namely; cash amounting to TZS 3,876,000.00, two mobile phones and wooden stand all listed in a

certificate of seizure admitted during the trial as exhibit P5. On its face, exhibit P5 appears to have been signed by the appellant and DW2 with their respective thumb prints and witnessed by PW6 whilst PW5 counter-signed it. There was a suggestion by the appellant and DW2 during the trial that they were forced to sign exhibit P5 but the trial court found little substance in that contention.

Afterwards, PW5 and his team left with the appellant and DW2 to DCEA along with the exhibits for necessary action. Initially, PW5 took the seized exhibits and kept them in his office cabinet before a hand over to PW3; the exhibits keeper later at about 1:00 p.m. It is common ground that PW5 admitted that at the time PW7 handed over the seized exhibits to him, he did not mark and seal it. It was PW3 who marked it with a marking tape as 'A' in PW5's office after the handing over to her through a dispatch book and recorded the particulars in an exhibit register. Due to the prosecution's indifference, the two documents did not find their way into the record as part of the evidence. Nevertheless, the trial court accepted the oral evidence of PW3 and PW5 as truthful in respect of the handover. After the handover, PW3 sealed the exhibit said to contain illicit material stuffed in the disputed envelope in the presence of a security guard from one of the security companies guarding the

premises going by the name of John Ligoha (PW4) as an independent witness, PW5, the appellant and DW2 as well as William Massawe (PW2).

At the end of the exercise, PW3 marked the envelope with a number of the case file; No. DCEA/IR/2017 and PW2 and PW4 appended their signatures on the top of the envelope. She likewise appended her signature on the envelope before keeping it in the exhibit room. On 09th October, 2017, PW3 assigned PW2 to deliver the sealed envelope to the Chief Government Chemist (CGC) where, Elias Mulima (PW1) took samples from the contents of the sealed envelope for analysis. The non-confirmatory results from initial testing revealed that the samples contained Heroin Hydrochloride. Afterwards, PW1 resealed the envelope and handed it back to PW2 who returned it to DCEA. The confirmatory analysis of the samples done by PW1 revealed that they contained Heroine Hydrochloride. PW1 posted his findings in a report he prepared and had it sent to the DCEA which was admitted in evidence as exhibit P2.

In his sworn testimony, the appellant challenged the prosecution evidence particularly from PW5 and PW7 on the retrieval of the disputed transparent nylon bag. Instead, he told the trial court that what was

retrieved from him was a big black nylon packet different from what PW5 listed in exhibit P5 as item No. 1. In general, his line of defence was that the nylon bag alleged to have been seized from his room and eventually handed over to PW3 was implanted to him. The appellant took issues with the conduct of the search and the handover of the contraband to PW3 by PW5, participation of PW5 and PW7 in the search, sealing, packing and marking of the packet all of which boil down to questioning the integrity of the chain of custody of the exhibit from his home all the way to DCEA and the Chief Government Chemist for analysis.

Before the second accused was called to testify, the prosecution sought and obtained leave to amend the information aimed at inserting the word Hydrochloride after Heroin despite the objection from the appellant's advocate. Afterwards, the accused persons pleaded not guilty to an amended information. By reason of the line of defence the appellant took through his advocate, he found no need to give his evidence afresh.

DW2 for her part had more or less similar account with DW1 in relation to the nature of the exhibit retrieved from the appellant's room

which was, according to her, different from what PW5 recorded in exhibit P5.

The trial court formulated three points for determination of the case all revolving around the retrieval, handling, movement and custody of the exhibit said to contain narcotic drugs. The learned trial Judge made affirmative findings on each of them that is to say; **one,** there was sufficient evidence through PW5 and PW7 as well as a portion from the statement of the independent witness that the package recorded in the certificate of seizure (exhibit P5) was retrieved from the appellant's room during the search on the material night. **Two**, the exhibit which PW5 handed to the exhibit keeper (PW3) was the same one which was retrieved from the appellant's house and finally, it is the same exhibit which was tendered in court. In a nutshell, the trial court was satisfied that despite the absence of a paper trail to document the chain of custody, the oral evidence by the prosecution witnesses proved that the chain of custody was not broken and hence a finding of guilt against the appellant.

As alluded to above, the learned trial Judge did not find sufficient evidence to convict the second accused whom he acquitted. Dissatisfied,

the appellant has preferred this appeal against both conviction and sentence faulting the trial court's decision on 14 grounds of appeal.

At the hearing of the appeal, Mr. Wilson Ogunde, learned advocate appeared representing the appellant. The respondent Republic had the services of Ms. Lilian Itemba, learned Principal State Attorney and Ms. Tuly Helela, learned State Attorney resisting the appeal. Mr. Ogunde sought and was granted leave to abandon grounds one, two and three in the memorandum of appeal thereby remaining with 11 grounds clustered into four main issues namely:

1. Whether the order for the amendment of the information was proper;
2. Whether the finding on the retrieval of the contraband in exhibit P1 from the appellant's house was supported by evidence on record;
3. Whether the prosecution proved beyond reasonable doubt that the chain of custody from seizure, transfer, handling and storage of the exhibit was not broken; and
4. Was the trial court right in convicting the appellant on the evidence which was contradictory and inconsistent.

Mr. Ogunde began his submissions with grounds 12 and 13 covering the third issue and moved to grounds 4 and 5 dealing with complaints against the amendment of the information the subject of the first issue. He then canvassed grounds 6 and 7 dedicated to the complaint surrounding the retrieval of the exhibits from the appellant's house summarised in the third issue before winding up his submissions on grounds 8,9,10, 11 and 14 the basis of the appellant's complaint in the fourth issue. That notwithstanding, we find it convenient to deal with the appeal according to the sequence of the issues listed above.

Submitting on the first issue, Mr. Ogunde contended that the trial court granted the application for the amendment of the information despite his objection premised on the ground that the prayer for the amendment was made belatedly after the prosecution had closed its case and the appellant wound up his testimony. The learned advocate complained that the order was prejudicial to his client because it restricted his right to require the prosecution witnesses to be recalled for further cross examination contrary to section 276(3) of the Criminal Procedures Act [Cap. 20. R.E. 2002- now R.E. 2019], henceforth, the CPA. The Court was referred to its previous decision in **DPP v. Danford Roman @ Kanani & 3 others**, Criminal Appeal No. 236 of 2018

(unreported) underscoring the right to the defence to require the recalling of the prosecution witnesses for further cross examination after the amendment of a charge. Although he was not categorical, Mr. Ogunde appeared to suggest that the trial was thereby vitiated warranting an order declaring it a nullity.

Ms. Itemba was not moved by the learned advocate's argument. She argued that the trial court made the impugned order in accordance with section 276(2) of the CPA which allows amendment of the information at any stage of the trial. At any rate, the learned Principal State Attorney argued, the amendment was merely for the insertion of the word Hydrochloride after the word Heroine. She pointed out that afterwards, the appellant and DW2 pleaded to the amended information and, despite the trial court giving to the defence right to recall DW1 for further examination, he declined exercising that right. Furthermore, Ms. Itemba argued, there is no legal requirement under section 276(2) of the CPA recalling prosecution witnesses for further cross examination after the amendment in like manner applicable to subordinate courts under section 234(1) and (2) of the CPA. The learned Principal State Attorney distinguished the relevance of **DPP v. Danford Roman**

(supra) whose decision was predicated on section 234 of the CPA and urged us to disallow this ground.

Mr. Ogunde did not have any specific submission in rejoinder. He simply reiterated the submissions in chief.

There is no dispute that section 276 (2) of the CPA allows amendment of an information at any stage of the trial. As rightly submitted by Ms. Itemba, the section appears to be too wide to be interpreted in the manner submitted by Mr. Ogunde. It is plain from our reading of the section that all such amendments shall be made upon such terms as the court shall deem just. The term just appears to us to be the overriding consideration which means that the court can only refuse to allow amendment if doing so is not necessary to meet the circumstances of the case and, unless having regard to the merit of the case, the amendment cannot be made without causing injustice.

Admittedly, the prosecution prayed for amendment rather late for insertion of the word Hydrochloride in the information. There is no suggestion that the amendment was not necessary in the context of the merit of the case. There may be some merit in Mr. Ogunde's argument on the appellant's right to recall the witnesses for the prosecution for further prosecution after the accused persons had pleaded to the

amended information. However, it is our view that unlike section 234 (2) of the CPA, there is no similar requirement under section 276 (2) of the CPA it being in the trial Judge's discretion to order amendment on such terms as he may deem just. In this case, the learned trial Judge granted the respondent's prayer for amendment subject to the appellant's right to give evidence in defence afresh to which he declined as evident at page 98 of the record of appeal. It will be recalled that the learned advocate had predicated his objection to the prayer for the amendment on his client's right to defend which the trial court granted. He had no issue with the recalling of the witnesses for the prosecution for further cross examination. Indeed, there is no complaint that the trial court refused that right upon demand prior to and after the order for amendment. Under the circumstances, we have no slightest doubt that the criticism against the trial Judge is, with respect, misplaced.

At any rate, the scope of the amendment was just too narrow, that is, insertion of the word Hydrochloride after the word Heroin. We are unable to see how that insertion meant to complete the name of the narcotic drug subject of the information could have caused any injustice to the appellant by reason of the trial court's failure to allow the appellant right to recall prosecution witnesses for further cross

examination. As the record will bear testimony appellant was represented by an advocate of outstanding experience as far as we are aware. Had he found it necessary to have any witnesses for the prosecution recalled for further cross examination, we are unable to comprehend why he did not resort to section 147 (4) of the Evidence Act [Cap. 6 R.E 2019] (the Evidence Act) and achieve the same purpose. That section empowers the trial court to permit witnesses to be recalled for further examination in chief, cross examination or re-examination. The fact that the appellant's advocate did not find it necessary to exercise that right militates against his complaint in this appeal. That said, we find no merit in this ground and dismiss it. Next for our consideration is the second issue dedicated to the retrieval of the contraband.

Essentially, Mr. Ogunde faulted the trial court in its finding that the contraband, subject of the information, was retrieved from the appellant's room relying on part of the statement of PW6 (exhibit D1) who was declared as a hostile witness. The learned advocate pointed out what he referred to as irreconcilable inconsistencies in the oral testimonies of PW5 and PW7 on who in particular retrieved the alleged contraband from the appellant's room between PW7 and WP DC Witness

who was not, however, called to testify. According to the learned advocate, failure to call WP DC Witness who conducted the search was adverse to the prosecution case considering the absence of an independent witness thereby justifying the appellant's complaint that the contraband was implanted into his room by PW7.

Relying on the testimonies of PW5 and PW7, Ms. Itemba countered the argument by her learned friend and argued that their evidence satisfactorily proved that it was PW7 who saw the packet containing a powder suspected to be narcotic drugs in the course of the search conducted in the presence of the appellant. The learned Principal State Attorney ruled out any possibility of PW7 implanting the contraband in the appellant's room. She urged the Court to dismiss this ground.

We shall start with what transpired at the appellant's house upon the arrival of PW5 and his team. The evidence on the chronology of the events came from PW5 and PW7. That evidence shows that when it became necessary to have independent witness in the search, PW5 asked PW7 to look for a ten-cell leader through street security guards upon arrival at the appellant's house. After introductions, the search started involving two key participants, WP DC Witness and PW7 whilst PW5 stood by the door of the room.

It is common from the testimonies of PW5 and PW7 that before the search commenced, the police officers searched themselves in their pockets. There was little contest on this. It was also not seriously disputed that it is PW7 and WP DC Witness who were actively involved in the search alternately under the supervision of PW5. That suggests, in our view, that PW5 had his eye on PW7 and WP DC Witness. Again, there was no dispute that WP DC Witness was the most junior in the ranks which explains why she was actively involved in the search closely supervised by PW7 under the overall supervision of PW5. What this means to us is that PW7 was actively involved in the search and this explains why he saw a packet in a transparent nylon bag over-hanging in one of the branches of the wooden stand (item No. 4 in exhibit P5) which he suspected to be a contraband they were looking for. It is on record that DW2 was asked about it to which she replied that it was a nutritional material for her child. When all this took place, the appellant was in the room witnessing what was taking place.

Accordingly, the suggestion that the packet was implanted by PW7 is hardly believable. This is so because; **one**, DW2 owned the packet as containing nutritional material for her child, **two**, there is incontrovertible evidence that the packet was retrieved by PW7 and

handed over to PW5 immediately thereafter. As the evidence by the prosecution has shown, that packet was too big to have been hidden in the hip pockets of PW7 or WP DC witness; **three**, PW7 was referred to a statement by the hostile witness admitting that a big packet in a transparent nylon bag was found in the appellant's room during the search witnessed by the appellant.

Mr. Ogunde faulted the trial Judge for placing reliance on that part of the statement but we think, with respect, his attack is misplaced. The impugned part of the statement was read by PW7 at the instance of the appellant's advocate primarily to save DW2 from involvement in the contraband. Under the circumstances, we are unable to comprehend why that part of statement in the record should not be used against the appellant proving that the substance suspected to be narcotic drug was retrieved in the appellant's room during the search.

There was a submission on the prosecution's failure to call WP DC Witness on which Mr. Ogunde burnt some calories urging us to draw an adverse inference for that failure. With respect, having examined the evidence of PW5 and PW7 and guided by section 143 of the Evidence Act, we do not think the failure to call WP DC Witness attracts any adverse inference as contended by the learned advocate. We are saying

so because what was required was not the quantity rather the quality of the evidence to prove that the contraband was retrieved from the appellant's room. At any rate, on the authority of **Aziz Abdallah v. R** [1991] T.L.R 71, drawing an adverse inference by itself does not necessarily shake the case for the prosecution. Undeniably, as seen above, PW5 and PW7 adduced satisfactory evidence proving that the narcotic drugs were found in the appellant's room. Under the circumstances, it is our view that there was no need to call WP DC witness to prove the same thing the more so the contraband was retrieved by PW7. The upshot of the foregoing is that we uphold the trial court's finding that the contraband; exhibit P1 subject of the information, was indeed retrieved from the appellant's room. The appellant's complaint in this cluster of complaints is thus dismissed. That now takes us to the appellant's complaint on the alleged compromised chain of custody, the nub of ground 12 and 13 in the memorandum of appeal.

Addressing the Court, Mr. Ogunde commenced his submissions with the description of the contraband in exhibit P1 in the certificate of seizure indicated as one big nylon packet. The learned advocate drew our attention to the facts of the case read during the preliminary hearing

describing the same item as a small nylon bag. On the other hand, he argued, the evidence of PW5 shows that it was a transparent nylon bag which differs with the description of the same item in exhibit P5.

Mr. Ogunde invited the Court to accept his argument that the chain of custody was not intact because; **one**, the packet was not marked and sealed immediately after the seizure; **two** it remained in a cabinet in PW5's office which was accessible to the undisclosed exhibit keeper neither was there any evidence that no other person had access to it before handing over the same to PW3; **three**, the handing over of the exhibit to PW3 by PW5 took place in the absence of PW2, William Massawe who came in later participating in the packing and sealing, **four**, contrary to the trial Judge's finding, the exhibit did not find its way to the exhibit room before the packing; **five**, whereas PW3 stated that she marked the exhibit with mark 'A', PW2 did not see that mark before the packing in the open room; **six,** there was no paper trail to resolve the contradictions and inconsistencies in the oral evidence of the witnesses thereby justifying a finding that the integrity of the chain of custody was compromised.

The learned advocate buttressed his argument with some of the Court's previous decisions in **Zainabu D/o Nassoro @ Zena v. R,**

Criminal Appeal No. 348 of 2015, **Paulo Maduka & 4 Others v. R**, Criminal Appeal No. 110 of 2007 and **Alberto Mendes v. R**, Criminal Appeal No. 473 of 2017 (all unreported) for the proposition that proof of unbroken chain of custody must be by way of documentary evidence which was lacking in this case amidst inconsistencies in the oral evidence. The learned advocate urged the Court to hold that the prosecution failed to lead satisfactory evidence to prove an unbroken chain of custody.

Ms. Helela addressed the Court in reply in relation to the complaint regarding the integrity of the chain of custody. The learned State Attorney impressed upon us that the chain of custody was not broken at any stage from the seizure of the contraband and afterwards when PW5 handed over it to PW3 before the former did alike to PW2 for conveying to the CGC for chemical analysis. As to the variance in the description of item 1 in exhibit P5, Ms. Helela did not consider it to be too serious to affect the chain of custody. According to her, a big nylon bag recorded as item No. 1 in exhibit P5 was one and the same thing as a small nylon bag depending on the person who made the description. The learned State Attorney discounted the argument on the possibility of the undisclosed exhibit keeper accessing the cabinet where PW5 kept

custody of the contraband immediately after the seizure before he handed it over to PW3 later in the afternoon. This was more so because, she argued, there was only one exhibit keeper at DCEA; PW3 and so, accessibility of the exhibit before it was ultimately handed over to her did not arise.

With the foregoing arguments, the learned State Attorney downplayed the relevance and application of the cases the appellant's advocate cited to us to wit; **Paulo Maduka & 4 Others v. R, Zainabu Nassoro v. R**, and **Alberto Mendes v. R** (supra) as distinguishable to the circumstances of the instant appeal more so considering the short lapse of time the impugned exhibit was seized, handed over to PW3 and later to the CGC. She invited us to be guided by our previous decisions in **Khamis Said Bakari v. R**, Criminal Appeal No. 359 of 2017 and **Marcelino Koivogui v. R**, Criminal Appeal No. 469 of 2017 (both unreported) narrowing the scope of the rule in **Paulo Maduka's** case (supra) in relation to authenticating chain of custody with a paper trail. She urged us to dismiss this ground because the oral evidence by the witnesses for the prosecution proved an unbroken chain of custody of the exhibit in question.

Rejoining Mr. Ogunde argued that PW5 admitted that he did not see mark 'A' PW3 had inserted on the exhibit in his office before packing started which was an indication that the chain of custody was compromised.

We shall start with the description of item No. 1 in the certificate of seizure; was it a large nylon packet or a small nylon transparent bag? The learned State Attorney urged us to accept that the description meant to refer to one and the same thing. We respectfully agree with her considering that throughout the trial, witnesses referred to it differently but what is clear to us is that PW1 retrieved a big transparent nylon bag in which a packet containing the suspicious contraband was kept. There is no dispute in relation to the variance in the description of item No, 1 in exhibit P5 but we do not think it is material taking into account the evidence on record which shows that it was a nylon bag which DW2 owned it as containing nutritional material for her child.

The next aspect for our consideration is the complaint in relation to whether the unmarked exhibit kept in PW5's office cabinet prior to handing it over to PW3 was not accessed by the exhibit keeper who had a second key to the cabinet. According to PW3, prior to the handover of the suspicious contraband to her by PW5, she had been busy dealing

with exhibits in another case; Criminal sessions case No. 8 of 2018. It is common ground that the handing over took place in the office of PW5 at about 1:00 pm in the absence of the appellant and his co- accused as well as the independent witness; PW4. It is common ground that, throughout the trial, PW5 referred to the exhibit keeper. The only exhibit keeper who gave evidence was SP Neema Mwakagenda (PW3) to whom PW5 handed over the contraband in his office. The appellant's advocate did not put questions to PW5 to disclose the name of the exhibit keeper more so at a time when PW3, who introduced herself as the exhibit keeper had already given her testimony. We understand that the appellant had no duty to prove his innocence but had it not been clear which exhibit keeper being referred to and the defence deemed necessary to punch holes in the prosecution case on this, it is not clear why the learned advocate did not seek to recall PW3 for further cross examination. The fact that he did not do so, we are satisfied, as the learned trial Judge did, that the exhibit keeper referred to in PW5'S testimony was the same person who had a second key to the cabinet; PW3.

Having so said, we are also satisfied from the evidence that PW3 had no access to the cabinet during the time PW5 kept custody of the

contraband awaiting handover which he did at about 1:00 p.m. in his office. Any other suggestion will be a fanciful possibility. It was held in **Miller v Minister of Pensions** [1947] 2 All. ER 372 quoted with approval in **Magendo Paul & Another v. Republic** [1993] TLR 220, that fanciful possibilities should not be admitted to deflect the course of justice. See also: **Chandrakant Joshubhai Patel v. R,** Criminal Appeal No. 13 of 1998 (unreported). The suggestion by the appellant's learned advocate is but a remote possibility which cannot suffice to raise reasonable doubt that the chain of custody of the disputed exhibit was compromised merely because the cabinet was accessible to the exhibit keeper.

Next, we shall discuss two related aspects involving PW2's testimony. There is no dispute that the handover of the exhibit to PW3 by PW5 was done in the absence of PW2. The record shows that PW2 was summoned later at the stage of sealing and packing the exhibit in the open room. PW2's evidence also shows that after the packing, marking and sealing on the afternoon of 6 /10/2017 which happened to be a Friday, PW3 took the exhibit for safe custody before she gave it to PW2 for transmission to the office of the CGC for analysis. Mr. Ogunde suggested to us that PW2 did not see any mark on the exhibit before

the packing which contradicted PW5's evidence. The learned advocate also suggested that the trial Judge's finding that the exhibit was not marked before the packing was an indication that the chain of custody was broken. According to the learned advocate, the contradictions in the oral testimonies of the witnesses could only be resolved by paper trail in line with the Court's decisions in the cases of **Paul Maduka, Zainabu D/o Nassoro @ Zena** and **Alberto Mendes** (supra).

There is no dispute that PW2 was called in to participate in the packing of the contraband in a khaki envelope which was marked at its top with letter 'A' followed by the case file number. Evidence also shows that the packing and sealing took place in an open room in the presence of PW4, PW5 and the suspects at the time not so long after the handover. We are thus satisfied that the trial Judge's finding that the exhibit did not find its way to the exhibit room before the packing cannot be faulted. It is true that according to PW5 at the time of packing, PW3 took the exhibit from the exhibit room and saw it coming from a paper bag but he did not observe where she retrieved it from. He did not say so in his evidence in chief rather in cross examination. If we may hazard a guess, the cross examiner intended to fish a contradiction from PW5.

Be it as it may, we do not see that piece of evidence to be materially contradictory of the rest of the evidence. We say so because, examined closely, PW5 was not certain where PW3 retrieved the exhibit from before the packing in the open room more so because there is no suggestion that PW3 went to the open room directly after the handing over of the exhibit in PW5's office. In any case, there was evidence from PW5 that PW3 retrieved the exhibit from a plastic bag before packing it into a khaki envelope and sealing it. The interval between the handover and the packing of the exhibit does not suggest that PW3 took it to the exhibit room and retrieve it soon thereafter for packing and sealing it. There was no suggestion that what PW3 retrieved in the plastic bag was a different item from what was seized from the appellant's house. In the upshot, we are inclined to concur with the finding of the trial court that indeed, the exhibit did not find its way into the exhibit room after the handover to PW3 and before the packing and sealing in the open room. From the totality of the evidence on the record, we are satisfied that the cases referred by the learned advocate underscoring the need to document handling and movement of exhibits from one place to the other are, with respect, distinguishable. In particular, in **Zainabu D/o Omari @ Zena** (supra) there was evidence of an unexplained delay in

the movement of the pellets allegedly seized from the appellant from the office of the RCO to the office of the CGC which raised doubt on the integrity of the chain of custody. The Court found that to be sufficient to raise reasonable doubt in the prosecution's case. The position in the instant appeal is different in that the exhibit was taken to the office of the CGC within the first working day from the date of seizure of the exhibit from the appellant's house. On the other hand, **Paulo Maduka's** case involved money which change hands easily in comparison with narcotic drugs in the instant appeal. Mr. Ogunde must be aware that the rule in **Paulo Maduka** has been refined in many of our decisions including; **Vuyo Jack v. R**, Criminal Appeal No. 334 of 2016, **Chacha Jeremiah Murimi and 3 Others v. R**, Criminal Appeal No.551 of 2015, **Kadiria Saidi Kimaro v. R,** Criminal Appeal No. 301 of 2017 and **Moses Mwakasindile v. R**, Criminal Appeal No. 15 of 2017(all unreported). In the last decision the Court stated:

> "…. *while we appreciate the statement of principle in* ***Paulo Maduka*** *(supra) on the necessity of chronological documentation detailing on how an exhibit was seized, kept, controlled, and changed hands, we think, as we held in* ***Issa Uki*** *(supra),* ***Vuyo Jack (****supra)*

*and **Kadiria Saidi Kimaro** (supra), ... that the said requirement must be relaxed in cases relating to substances which cannot change hands easily and therefore not easy to tamper with...." (At pages 20 and 21)*

Guided by the foregoing, we have no hesitation in holding, as we do, that the learned advocate's attack suggesting that the chain of custody was broken is, with respect, misplaced. Accordingly, our answer to the third issue is inevitably an affirmation one; the prosecution proved beyond reasonable doubt that, the chain of custody was not broken.

Finally, we heard arguments directed at the alleged inconsistencies and contradictions in the evidence of prosecution's witnesses subject of the appellant's complaint in grounds 8,9,10 and 11. The appellant's learned advocate combined his arguments on ground 14 which faults the learned trial judge for the alleged failure to analyse properly the evidence on record.

To demonstrate his grievances, the learned advocate picked pieces of evidence from the testimonial accounts of PW3, PW4 and PW5 in relation to the marking of exhibit P1. The learned advocate argued that whereas PW5 stated that the nylon packet had mark 'A' before packing,

PW3 and PW4 said that it was marked with the case file number, that is; DCEA/IR/16/2017. The second area of the alleged contradictions and inconsistencies relates to PW5's evidence on the place where he stood during the search as opposed to PW7 and exhibit D1. Finally, Mr. Ogunde pointed out that PW4's evidence in cross -examination was contradicted by PW5 in relation to the place where PW3 retrieved the exhibit from before the sealing and packing. Mr. Ogunde impressed on us that the contradictions were material to the prosecution case raising reasonable doubt in the appellant's guilt.

Not unsurprisingly, Ms. Helela argued that the contradictions pointed out by the appellant's advocate were too minor to shake the case for the prosecution. Relying on our decision in **Marceline Koivogui v. R**, Criminal Appeal No. 469 of 2017 (unreported), the learned State Attorney urged us to dismiss the ground.

Winding up in rejoinder the learned advocate urged us to allow the appeal, quash the conviction and sentence and make an order for the return of the seized items other than the packet listed as item No. 1 in exhibit P5.

After our close examination of the evidence on record we are satisfied that the appellant's grievances are all misplaced. Firstly, we have already held that there was no contradiction in relation to the place where PW5 stood during the search as the overall in-charge of the search. Guided by our previous decision in **Dickson Elia Nshamba Shapwata & Another v. R,** Criminal Appeal No. 92 of 2007 (unreported), we agree with the learned State Attorney that if there was any contradiction, it was not material to shake the case for the prosecution. Secondly, there is no dispute that PW5 did not mark the exhibit immediately after the seizure. There is equally no dispute that it is PW3 who marked the nylon paper bag using a marking cello tape with letter **'A'** in the presence of PW5 immediately after the handover. The evidence at page 122 of the record of appeal shows that PW2 witnessed the sealing of the white substance in a khaki envelope which PW3 marked exhibit **'A'** with an addition of the case file; No. DCEA/IR/16/2017. We see no contradiction or inconsistence in relation to the marking of the exhibit denting the case for the prosecution. Finally, as we have already discussed the issue in relation to the place where PW7 retrieved the contraband from, we need not belabour the point any more except to stress that we have seen no contradiction in

that regard. In the result, we find no merit in the fourth cluster of the grounds and dismiss it.

In fine, since we have found no merit in any of the grounds, we are constrained to dismiss the appeal in its entirety as we hereby do.

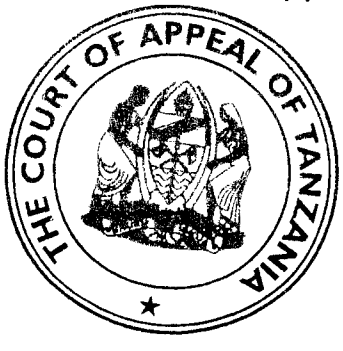
DATED at **DAR ES SALAAM** this 23rd day of July, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of July, 2021 in the presence of Mr. Andrew Magai, learned counsel for the appellant, and Ms. Cecisilia Shell, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL