IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 295 OF 2018

ANNA JAMANISTE MBOYA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Korosso, J.)

dated the 1st day of December, 2015
in
Criminal Sessions Case No. 23 of 2015

.....

JUDGMENT OF THE COURT

12th July & 15th October, 2021

MWAMBEGELE, J.A.:

The appellant Anna Jamaniste Mboya was convicted by the High Court of Tanzania sitting at Dar es Salaam of the offence of Trafficking in Narcotic Drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 of the Revised Edition, 2002 (the Drugs Act). The information for the offence placed at her door alleged that the appellant was, on 02.01.2011, at Julius Nyerere International Airport (JNIA) area within Ilala District, Dar es Salaam

Region, found trafficking into the United Republic of Tanzania, Narcotic Drugs, namely Cocaine Hydrochloride, weighing 1157.48 grams valued at Tshs. 46,299,200/=. She pleaded not guilty to the information after which a full trial ensued. After the full trial during which the prosecution fielded fourteen witnesses and tendered six exhibits and in defence the appellant was the sole witness and tendered no exhibit, she was found guilty, convicted and sentenced to a fine of Tshs. 188,897,600/= being an amount equal to three times the value of the narcotic drugs involved and, in addition to the fine, to a prison term of twenty years. She was aggrieved and thus filed this first and final appeal to the Court.

To add flavour to the present judgment, we think it appropriate to narrate a brief factual background to the appellant's arraignment and the appeal before us as can be gathered from the record of the appeal. It is this: on the said 02.01.2011 at around 13:00 hours the appellant landed at Julius Nyerere International Airport (JNIA) from Brazil aboard Qatar Airways. After clearance with the Customs and Tanzania Revenue Authority (TRA) at the airport, she exited but alas! no sooner had she stepped out of the airport than she was apprehended by D/Sgt Wamba

(PW4) and WP Grace (PW13), the duo having got wind that she was trafficking in narcotic drugs.

After the arrest, she was taken to the office of the Anti-Drug Unit (ADU) at JNIA for interrogation at which, from 02.01.2011 to 06.01.2011, she defecated 76 pellets which were suspected to contain illicit drugs. The defecation exercise of the pellets was witnessed at different occasions by Caroline John (PW8), WP Valentine (PW9), Genevieve Rugaigamu (PW10), PW13, Beatrice Alphonce (PW11), Iman Mpuoo (PW12) and Helen Nyamgali (PW14). Every time the appellant defecated the pellets, they were recorded in an observation form (Exh. P5) in which both the appellant and the witnesses signed. All the defecated pellets were handed over to ASP Neema Andrew Mwakagenda (PW7) who was the exhibits keeper at ADU Headquarters along Kilwa Road. After the appellant could defecate no more pellets, she was taken to ADU Headquarters on 06.01.2011 where the pellets were packed by PW7 ready for being taken to the Chief Government Chemist (CGC) for laboratory testing. The packing was witnessed by Amina Sonko (PW6) who was the ten cell leader of the place, the appellant herself and PW4 and a certain DC Englebert.

The packed pellets were taken to the CGC on 11.01.2011 where they were examined and tested by Ernest Lujuo Isaka (PW2) who concluded that the pellets contained cocaine hydrochloride weighing 1157.48 grams. The drugs were later taken to the Commission for Drugs Control (CDC) and upon assessing them, Commissioner Christopher Joseph Shekiondo (PW3), certified that they valued Tshs. 46,299,200.00 and issued a certificate to that effect (Exh. P3). It was against this background that the appellant was arraigned, prosecuted, convicted and sentenced as alluded to above.

The appellant's appeal to the Court is pegged on sixteen grounds in the memorandum of appeal lodged on 24.09.2018 and additional eight grounds in the supplementary memorandum of appeal lodged on 05.10.2020. However, the twenty-four grounds boil down to only the following seven clustered grounds of complaint:

1. Defective charge; the subject of ground 1 of the memorandum of appeal;
2. Tendering of exhibits; the subject of grounds 10,11 and 12 of the memorandum of appeal;
3. That it was not her signature; the subject of ground 13;

4. Exhibits and admission; the subject of grounds 2, 3, 4, 5 and 6; of the memorandum of appeal and grounds 1, 2 and 4 of the supplementary memorandum of appeal;

5. Contradictions in evidence; the subject of grounds 7, 8, 9 and 15 of the memorandum of appeal and grounds 5 and 6 of the supplementary memorandum of appeal;

6. Chain of custody; the subject of grounds 14 (a) – (f) of the memorandum of appeal and ground 3 and 7 of the supplementary memorandum of appeal; and

7. Failure to prove the case beyond reasonable doubt; the subject of ground 16 of the memorandum of appeal and ground 8 of the supplementary memorandum of appeal.

When the appeal was placed before us for hearing on 12.07.2021, the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Salim Msemo and Ms. Estazia Wilson, learned State Attorneys.

When we called on the appellant to argue her appeal, fending for herself, she did no more than adopt the twenty-four grounds of appeal comprised in both memoranda; the substantive memorandum of appeal and the supplementary one. Having so done, she asked the learned State

Attorney to put up her response after which, need arising, she would submit in rejoinder.

At the very outset of the response, Mr. Msemo intimated to the Court that the respondent Republic supported the appellant's conviction and sentence meted out to her. The learned State Attorney thereafter invited Ms. Wilson to argue the first three clusters after which he would argue the remaining ones.

On the first cluster; a complaint that the charge was defective, Ms. Wilson submitted that the charge was not defective and contained sufficient details which enabled the appellant to appreciate the charge levelled against her. The learned State Attorney took us to p. 8 of the record of appeal where the information contained the name of the appellant, the place of the commission of the offence and amount of the illicit drugs the appellant allegedly possessed. He thus submitted that the provisions of sections 132 and 135 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2019 (the CPA) which provide for what should the charge contain, were complied with. To buttress this argument, the learned State Attorney cited our decision in **Khamis Said Bakari v.**

Republic, Criminal Appeal No. 359 of 2017 (unreported). She thus submitted that the complaint the subject of the first cluster, had no merit.

The second cluster comprised grounds 10, 11 of 12 of the substantive memorandum of appeal whose gist is that the exhibits were improperly tendered and admitted in evidence. Ms. Wilson submitted that the complaint hinged on the Report from the Chief Government Chemist (Exh. P2) and the Valuation Certificate (Exh. P3). On this complaint, the learned State Attorney submitted that the appellant was represented by an advocate and that at pp. 30 and 35 of the record of appeal, her advocate was asked if he had any objection to the tendering of the two exhibits and he is recorded as having no objection to both. She added that the appellant never complained all along thus her complaint on appeal is but an afterthought. On this proposition, she cited to us our decision in **Livinus Uzo Chime Ajana v. Republic**, Criminal Appeal No. 13 of 2018 (unreported) at p. 26-27. With regard to Exh. P3 the learned counsel cited **Chukwudi Denis Okechukwu & 3 others v. Republic**, Criminal Appeal No. 507 of 2015 (unreported) at p. 35 to argue that the certificate of value was relevant for bail and sentencing purposes only.

The third cluster is the subject of ground 13 of the substantive memorandum of appeal; a complaint that the signature on Exh. P5 was not the appellant's. She submitted that even though the signature was contested by the appellant at the trial, PW13 testified at pp. 123 and 124 that she witnessed the appellant signing Exh. P5 and identified the handwriting and signature as appearing at p. 126 of the record of appeal. The learned counsel submitted that as PW13 was found credible by the trial court, in terms of section 49 (1) and (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (the Evidence Act), that was sufficient proof, for handwriting may not necessarily be proved by expert evidence. She added that in view of the fact the appellant claimed that the signature was not hers, it was incumbent upon her to prove that allegation as required by section 110 of the Evidence Act. After all, the learned State Attorney argued, the witness was not cross-examined on that aspect and no challenge surfaced in defence.

Mr. Msemo, gave Ms. Wilson a hand to argue the fourth cluster. This comprised grounds 2, 3, 4, 5 and 6 of the memorandum of appeal and grounds 1, 2 and 4 of the supplementary memorandum of appeal. **First**, is the complaint that the cautioned statement was taken out of the time

prescribed under section 50 (1) of the CPA. He argued that the defecation process at JNIA took long as testified by PW1 at p. 79 of the record of appeal. The learned counsel thus submitted that the delay not to record the cautioned statement within the four hours prescribed by the law was justified in terms of section 50 (2) (a) of the CPA and **Abdallah Rajab Mwalimu v. Republic**, Criminal Appeal No. 361 of 2017 (unreported) at p. 15 line 1-7.

Secondly, Mr. Msemo argued that the appellant had no objection to the making of the cautioned statement (Exh. P6). PW7 who recorded the appellant's cautioned statement testified at pp. 72 to 74 how she wrote the statement after giving the appellants all her rights.

Thirdly, the appellant also complained that Exh. P6 was not procedurally recorded by PW7 who played a double role and had an interest to serve as she was a custodian of Exh. P1 and Exh. P6. The learned State Attorney submitted that the complaint is misconceived because there is no law that prohibits an exhibit keeper like PW7 to record a cautioned statement. After all, he argued, the appellant did not cross-examine on the interest complained of which meant that the witness stated but the truth. To reinforce this proposition, he cited our decision in

Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010 (unreported).

Fourthly, the appellant complained that the cautioned statement was not recorded in the form of question-and-answer system as required by section 57 (2) (a) of the CPA. In response to this complaint, Mr. Msemo conceded that the cautioned statement, indeed, was not written in the form of question-and-answer system. However, the learned State Attorney was quick to submit that the course of action did not prejudice the appellant. Buttressing this standpoint, Mr. Msemo again cited to us **Nyerere Nyague** (supra).

Fifthly, the appellant complained on the trial court convicting her on the retracted confession. Mr. Msemo responded that before convicting the appellant on the strength of the retracted confession, the trial court warned itself on the dangers of convicting the appellant on it. He contended that there was enough evidence to corroborate the retracted confession. Actually, he argued, there was enough evidence to ground a conviction of the appellant even without the cautioned statement. He added that the narration in the cautioned statement as appearing at pp. 191 – 199 of the record of appeal tallied with the testimony of PW6. If

the appellant was innocent, he asked, how would he be able to give such details. To buttress the point that the detailed account of the appellant strengthened the prosecution story, Mr. Msemo cited to us our decision in **Yustas Katoma v. Republic**, Criminal Appeal No. 242 of 2016 (unreported) at p. 19.

Sixthly, the appellant complained that the alleged oral confession to PW6 was not tested its voluntariness. The learned State Attorney submitted that the trial within a trial which normally checks the voluntariness, or otherwise, of a written confessional statement, is not applicable with regard to oral confessions. He added that the appellant did not cross-examine PW6 to challenge his testimony. Neither did she state anything in defence to challenge PW6. The complaint is therefore without basis, Mr. Msemo submitted.

The fifth cluster composed of grounds 7, 8, 9 and 15 of the substantive memorandum of appeal and grounds 5 and 6 of the supplementary memorandum of appeal. One of the complaints in this cluster is that there were contradictions in the testimony of PW9 and PW11 on how many pellets the appellants defecated on the night of 04.01.2011; while PW9 testified at p. 108 that they were two, PW11 testified at p. 116

that it was only one. Mr. Msemo submitted that the discrepancy was very minor and did not go to the root of the offence. After all, he argued, the contradiction does not negate the fact that PW9 and PW11 witnessed the appellant defecate the pellets. On the need to ignore minor contradictions which did not go to the root of the matter, Mr. Msemo cited to us **Chukwudi Denis Okechukwu** (supra) in which we relied on our previous decision in **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) to state the standpoint.

Mr. Msemo also responded to the complaint by the appellant to the effect that the 76 pellets were not listed that they will be among the exhibits to be tendered. He submitted that the complaint had no truth and not backed by the record of appeal as at p. 5, the State Attorney is recorded as saying the 76 pellets would be tendered in the High Court.

The sixth cluster comprised grounds 14 (a) - (f) of the memorandum of appeal and grounds 3 and 7 of the supplementary memorandum of appeal. The gist of the complaint in this cluster is that the chain of custody was broken. Mr. Msemo submitted that the defecation process of the 76 pellets was done from 02.01.2011 to 06.01.2011 and all the witnesses who witnessed the defecation were called to testify and identified the appellant

as well as the pellets. He submitted further that the pellets were marked; each pellet was marked as testified at pp. 19, 28, 29 and 31 of the record of appeal. In the circumstances, the same could not be easily tampered with and was in compliance with paragraph 8 (1) of the PGO which requires that an exhibit should be labelled and as observed at p. 32 of **Livinus Uzo Chime Ajana** (supra).

Mr. Msemo also responded to the complaint that the head of ADU was not called to testify. He submitted that his testimony was not necessary because the testimonies of PW5, PW9, PW10 and PW15 covered what would have been testified by the said head of ADU. These witnesses were found by the trial court as credible and urged us to see that the credibility of those witnesses was within the empire of the trial court as we observed in **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (unreported) and **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (also unreported).

Cluster 7 comprised ground 16 in the substantive memorandum of appeal and ground 8 in the supplementary memorandum of appeal whose common complaint is that the case against the appellant was not proved beyond reasonable doubt. Mr. Msemo submitted that in view of what had

been submitted in respect of the clusters above, the case against the appellant was proved to the hilt. In the premises, he implored us to dismiss the appeal in its entirety.

In rejoinder, the appellant did not bring to the fore any meaningful response. She did not refute any argument which arose in the Republic's response. She simply prayed that the five years she was under custody before she was sentenced on 01.12.2015 be inclusive of the sentence imposed on her. It was her prayer that, taking into account the five years under reference, she should be sentenced to serve a prison term of fifteen years. She rested her case with an anecdote that she was in ill health as she had undergone a major surgical operation in the recent past and she had not recovered from it yet. She was still recuperating, she stated in vivid remorse.

We shall determine this appeal in the manner followed by the learned State Attorneys, that is, we shall determine it on the clusters used by them.

The first cluster comprises the first ground of appeal in the substantive memorandum of appeal which is that the learned trial Judge erred in law and fact by convicting the appellant basing on a defective

charge as it did not disclose the nature of the offence charged; that is, trafficking in drugs by importing into the United Republic of Tanzania or exporting from the United Republic of Tanzania, time for commission of the alleged offence and the total number of pellets and their description. We wish to state at this juncture that reference to the charge by the appellant should be taken to refer to the information. Whether it is a charge or information is just a matter of nomenclature, because it is an information once filed in the High Court and the same document is referred to a charge once filed in the courts subordinate thereto. The appellant was tried by the High Court and it is the information appearing at p. 8 of the record of appeal on which he was prosecuted and convicted. We have closely examined the information under reference. Having so done, we have grave doubts if the appellant's complaint has any scintilla of merit. We shall demonstrate. The provisions of section 16 (1) (b) (i) of the Drugs Act under which the appellant was charged read:

> *"16. -(1) Any person who-*
>
> *(a) N/A*
>
> *(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out*

by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable-

(i) in respect of any narcotic drug or psychotropic substance to a fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition to imprisonment for life but shall not in every case be less than twenty years".

Any charge or information drawn must conform with the guidelines under the provisions of section 132 of the CPA which provide:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The particulars of the offence the appellant was charged with as appearing at p. 8 of the record of appeal appear as follows:

"Anna Jamaniste Mboya, on or about the 2nd day of January, 2011 at Julius Nyerere International Airport area within Ilala District, Dar es Salaam

Region, did traffic in narcotic drugs namely: Cocaine Hydrochloride weighing 1157.48 grams valued at forty six Million Two Hundred Ninety Nine Two Hundred Shillings Only (Tshs. 46,299,200/=)."

As apparent in the above particulars of the offence there are provided the name of the accused person, the date and place of the commission of the offence, the illicit drugs involved as well as its weight and value. The appellant complains that the information is deficient in the particulars thereof for not indicating whether she was trafficking in drugs by importing in, or exporting from, the United Republic. She also complains that the information did not indicate the number of pellets allegedly found in her possession as well as the time the offence was committed. We agree with the appellant that the information did not state whether she was trafficking in the said drugs by importing in, or exporting from, the United Republic. We also agree with her that the 76 pellets allegedly found in her possession and the time of the commission of the offence were not indicated in the particulars of the offence in the information. However, we haste the remark that the infraction was not of such a magnitude as to make the information defective. If anything, it seems to us, the omission was minor and did not prejudice the appellant.

We say so because the evidence of witnesses was quite vivid that she arrived from Brazil and that she defecated 76 pellets for which she was prosecuted. With regard to time of the commission of the offence, we also hold that the infraction was not prejudicial to the appellant, for PW8, PW9, PW10, PW13, PW11, PW12 and PW14, the witnesses who were officers in-charge of the defecation process testified that the exercise took place from 02.01.2011 to 06.01.2011. In the circumstances, we agree with Ms. Wilson that mentioning the exact time during which the appellant was found in possession of the illicit drugs would be impracticable.

Flowing from the above, we are of the considered view that the details in the information provided sufficient particulars to the appellant so as to enable her appreciate the charges levelled against her and to make her provide a meaningful defence. We find solace on this stanpoint in our decision in **Khamis Said Bakari** (supra), the case referred to us by Ms. Wilson. In that case, like in the present, the appellant complained that the information was defective for containing insufficient particulars of the offence. Having stated that the information was compliant with the dictates of section 132 and 135 of the CPA, we observed at p. 11 of the typed judgment:

> *"... the particulars of the offence in this case indicate the name of the appellant as the accused person, and that he trafficked in a narcotic drug known as Heroin Hydrochloride weighing 963,24 grammes worth TZS. 43,390,800.00 at the JNIA in Ilala District in Dar es Salaam. We cannot help but wonder what other detail the appellant expected in the particulars of the offence. Accordingly, the first ground of appeal fails."*

In the circumstances, we find ourselves unable to agree with the appellant that the information was defective and dismiss the complaint in the first cluster, the subject of the first ground of appeal in the substantive memorandum of appeal.

The second cluster concerns a complaint on admission of the Report from the Chief Government Chemist (Exh. P2) and the Valuation Certificate (Exh. P3). We have considered the complaint by the appellant on the admission of Exh. P2 and fail to comprehend why the complaint. Exhibits P2 and P3 were admitted in evidence at pp. 30 and 35 of the record of appeal. Before they were admitted the appellant, who was represented, was asked through her advocate if she had any objection and there was no objection. The exhibits were then admitted and marked accordingly. After

admission and being marked, they were read out loud in court. We think, with respect, the two exhibits were properly admitted in evidence.

On Exh. P2 the appellant's complaint is also that it was a mere letter while it ought to have been in a form prescribed in the third schedule to "the Pharmaceutical and Dangerous Drugs Act, 1986 as amended by Act No. 6 of 1991". We are afraid, the legislation referred to by the appellant is not in our statute book and we have failed to figure out which legislation the appellant had in mind. We wish to state that, as far as we are aware, there is no prescribed format on which the CGC is supposed to make his report. The practice has always been to make such a report in form of a letter as appearing in Exh. P2 at p. 186 of the record of appeal. The foregoing notwithstanding, we fail to understand how the format of the report prejudiced the appellant.

The appellant also complained on Exh. P3 that it made no reference to the case at hand; that it did not disclose important details in relation to the case at hand. With respect, we are unable to agree with the appellant on this complaint. The exhibit was tendered by PW3 who introduced himself as a commissioner for Drug Control Commission. He testified at p. 34 of the record of appeal that he received from ADU file JNIA/IR/2/2011

together with a letter from the CGC bearing Ref. No. LAB/17/2001 dated 27.01.2011 to provide the value for 1,157.48 grams of cocaine hydrochloride which he did through Exh. P3. As already stated above, the defence did not object to the tendering in evidence of the exhibit. Neither did they cross-examine on whether the exhibit was connected to the case at hand. We have observed in a number of our decisions that it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence – see: **Nyerere Nyague** (supra), **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 and 2010 (both unreported), to mention but a few. As the appellant did not cross-examine PW3 on this complaint, we find and hold that the defence accepted that the witness spoke but the truth. Thus, her complaint at this stage, we respectfully think, is but an afterthought and we dismiss it.

We now turn to consider the complaint in the third cluster in which the appellant complains that the signature on the observation form (Exh. P.5) was said to be hers without calling a handwriting expert. We will not be detained by this ground. PW13 testified that the appellant wrote and

signed and identified the appellant's handwriting. The trial court believed PW3 that she testified but the truth. After all, the appellant at p. 140 of the record of appeal when cross- examined by Mr. Mutalemwa, learned Senior State Attorney, after being shown Exh. P5 she identified her signature and stated that she signed after being promised that her belongings would be returned to her. In the circumstances, we think, there was no need of calling a handwriting expert as the appellant was not disputing her signature on that exhibit. And, again, as if to clinch the matter, the appellant did not cross-examine the witness on whether what appeared on Exh. P5 was her handwriting and signature. The legal position on failure to cross-examine is as stated above; failure to cross-examine a witness on an important aspect denotes that the witness is stating but the truth. We however do not agree with Ms. Wilson that the handwriting of the appellant could be proved by PW13 in terms of section 49 (1) and (2) of the Evidence Act. That section is applicable in circumstances when a witness is acquainted with the handwriting under observation which is not the case in the appeal before us.

Next for consideration is the fourth cluster which comprises the complaints in ground 2, 3, 4, 5 and 6 of the memorandum of appeal and

grounds 1, 2 and 4 of the supplementary memorandum of appeal. There are several complaints in this cluster. **First**, the appellant complains that the cautioned statement was taken contrary to the dictates of section 50 (1) (a) of the CPA. Mr. Msemo argued that the defecation process at JNIA took four days. As such it would not be possible to comply with section 50 (1) of the CPA. He relied on **Abdallah Rajab Mwalimu** (supra) to reinforce the position that the delay was excusable in terms of section 50 (2) of the CPA. Unfortunately, apart from the complaint in the ground of appeal, we did not have the advantage of hearing the version of the appellant in clarification, for, as stated above, she did not amplify the grounds in the memorandum of appeal but simply prayed for reduction of the sentence. We agree with Mr. Msemo that in the circumstances of the case, compliance with section 50 (2) of the CPA would not be possible as the defecation process at JNIA was going on. As it appears to us, like Mr. Msemo, the delay is excusable under section 50 (2) (a) of the CPA. In the premises, the time when the appellant was defecating the pellets at JNIA would not be reckoned as part of the period within which the four hours fall. For easy reference we hereunder reproduce the section 50 (2) (a) of the CPA:

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

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

In **Abdallah Rajabu Mwalimu** (supra), the case cited to us by Mr. Msemo, a case with identical facts, we were confronted with an akin complaint. In that case, like in the present, the appellant complained that the cautioned statement was not recorded within the four hours prescribed by law. The respondent Republic argued that the delay in recording the cautioned statement was fully explained by the prosecution witnesses that as the appellant continued to defecate the pellets while under custody at JNIA, it was not possible for the cautioned statement to be recorded before the said exercise was completed. They argued that the provisions of section 50 (2) of the CPA was properly invoked by the trial court to come

to the conclusion that there was no prejudice which was caused to the appellant considering the advanced reasons for the delay in recording the said statements. The court observed:

> *"We are also satisfied that the prosecution explained the reasons why the said exhibit was recorded after the expiry of four hours as provided by the law as the circumstances obtaining in this case warranted the trial court to come to the conclusion that the provisions of section 50 (2) of the CPA could come into play."*

We are guided by the position we took in **Abdallah Rajabu Mwalimu** (supra) and dismiss this complaint.

Secondly, the appellant complained that Exh. P6 was not procedurally recorded by PW7 who played a double role and had an interest to serve as she was a custodian of Exh. P1 and Exh. P6. On this complaint, we agree with Mr. Msemo that the fact that PW7 was the custodian of Exh. P1 and Exh. P6 did not disqualify her from recording the cautioned statement. We also do not agree that PW7 had any interest to serve. We also agree with Mr. Msemo that if the appellant thought PW7 was not qualified to record the cautioned statement and had interest to

serve, she would have challenged that through cross-examination. Failure to cross-examine on what she thought was relevant, suggests that her complaint on appeal is but an afterthought – see: **Damian Ruhele**, **George Maili Kemboge** and **Nyerere Nyague** (all supra). We therefore dismiss this complaint as well.

Thirdly, the appellant complained that the cautioned statement was not recorded in the form of question-and-answer system as required by section 57 (2) (a) of the CPA. This complaint will not detain us. We agree with Mr. Msemo that the fact that the cautioned statement was not written in the form of question-and-answer did not prejudice the appellant.

Fourthly, the appellant complained on the trial court convicting him on a retracted confession. Mr. Msemo, in our view, provided a sufficient response. Admittedly, the appellant retracted her confession in the cautioned statement to the effect that she made it because she was promised that her belongings would be returned to her. The trial Judge was alive to the principle that a court of law should not convict an accused person on a retracted confession without corroboration unless it satisfies itself on the dangers of doing so. In the appeal before us, the trial court observed that there was enough evidence to corroborate the cautioned

statement. We wish to reproduce what the trial court observed at p. 222 of the record of appeal:

> *"... it is important to understand that where a confession has been retracted or repudiated, like the case on hand whereby the cautioned statement of the accused, the court has to be cautious in finding a conviction using it. The court has to look and be fully satisfied that, in all the circumstances of the case that the confession is true. In most cases it might be important to see whether the confession is corroborated in some material particular by independent evidence. Reliance on a confession can be done if fully satisfied that considering all the material points and surrounding circumstances the confession cannot but be true. This court is mindful of the need to exercise extreme caution before relying on either of the confessions to record a conviction, and do evaluate the said confessions on that basis."*

Having so warned itself, the trial court went on:

> *"In this case the material facts within the contents of the confession are amply corroborated, the issue of the accused coming from Brazil via Doha, which*

is a fact not being disputed, the fact she stated in the confession she had not taken the 84 pellets but only 80 and that she had vomited some pellets in Doha and thus leaving with 76 pellets which are what the accused person emitted. The accused person assertion that her xray results had revealed there was nothing in her stomach does not hold water especially in view of the fact that, the said xrays according to her evidence were done on the 6/01/2011 at the time even the investigators had decided to transfer her to the ADU headquarters for further questioning because despite going to the toilet twice for call of nature she had not emitted anything, it is obvious that any x-ray would have shown there was nothing having already emitted 76 pellets as the adduced evidence shows. It suffices that when you consider the overall evidence of the prosecution, we find that, even if this court was to find that the confession is not true, or was not voluntary, the remaining evidence is very strong and enough to prove the prosecution case."

It is our considered view that the trial court correctly expounded the position of the law and reached the correct verdict which we endorse. This complaint is therefore found to be devoid of merit.

Fifthly, the appellant complained that the trial court convicted her on the strength of the alleged oral confession to PW6 which was not tested its voluntariness. The learned State Attorney submitted that an oral confession, unlike written confessional statements, cannot be checked its voluntariness or otherwise, by enquiry a trial within a trial. We agree with Mr. Msemo. An oral confession is tested its voluntariness by looking at the credibility and reliability of the witness testifying. If the appellant doubted the testimony of PW6 we expected her to challenge him by way of cross examination. Failure to do that makes us hold that the complaint was but an afterthought. Similarly, the appellant did not state anything in defence to challenge PW6's testimony regarding her confession to her. This complaint is also devoid of merit.

Next for consideration is the sixth cluster listed above. The subject of grounds 7, 8, 9 and 15 of the memorandum of appeal and grounds 5 and 6 of the supplementary memorandum of appeal. The gist in this cluster is that there was contradiction in the evidence of witnesses for the prosecution. The appellant complained that PW9 and PW11 contradicted on the number of pellets defecated by her on 05.01.2011; that while PW9 testified that the appellant defecated one pellet, PW11 testified that she

defecated two pellets. Similarly, connected with this complaint, the appellant complained that the amount of pellets testified to by PW9 to have been defecated on 05.01.2011 differs with that recorded in the observation form (Exh. P5). Along with these two complaints, the appellant also lamented that PW9 testified to have witnessed a total of thirty nine pellets being defecated by the appellant (p. 107 line 22) while the total pellets she stated to have witnessed from 03.01.2011 to 05.01.2011 were forty. We agree that the contradictions complained of are apparent in the record of appeal. However, we haste the remark that the complaints are minor such that they cannot demolish the prosecution case – see: **Dickson Elia Nsamba Shapwata** (supra), **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), **Mohamed Haji Ali v. Director of Public Prosecutions**, Criminal Appeal No. 225 of 2018 (unreported). In **Elia Nsamba Shapwata** (supra), the Court quoted the following excerpt from the learned authors of **Sarkar, the Law of Evidence**, 16th Edition, at p. 48:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the*

time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

The complaints in this cluster are found to have no merit and dismissed.

We now turn to consider the seventh cluster whose complaint is, essentially, on the chain of custody of Exh. P1; that it was broken.

We have thoroughly gone through the record of appeal and, having so done, we are of the well-considered opinion that the chain of custody of Exh. P1 was not broken. The witnesses who handled the said exhibit clearly explained the movement of such exhibit. Commencing from the defecation exercise, the evidence is clear that after each time the appellant defecated the pellets, they were washed and recorded in the observation form (exh. P5) which was signed by the witnesses and the appellant and then they were handled to PW7 who stored them at ADU headquarters.

Then on 07.01.2011 the appellant, PW6 and other police officers witnessed PW7 packing the 76 pellets and took them to CGC where they were tested by PW2. Thereafter, PW2 sealed and returned them to PW7 with Exh. P2. Then PW7 tendered Exh. P1 during the hearing of Economic Sessions Case No. 95/2011 which was discontinued. Then PW1 sealed the said exhibit and it was returned to ADU for storage because it was already tendered in court but the court did not have storage facility. That is the reason why during the trial of the case which is subject of this appeal Exh. P1 was tendered by PW1 who sealed it when the original case was withdrawn. In our view, the tale of events regarding the handling of Exh. P1 leaves no doubt that there was no room for tampering with it. The prosecution witnesses clearly established the chain of custody of the 76 pellets. The Court has held times without number that if the witnesses who handled the exhibit testified on how they did handle such exhibit, sufficiently establishes the chain of custody and no need of paper trail – see: **Moses Mwakasindile v. Republic,** Criminal Appeal No 15 of 2017 (unreported) and **Marceline Koivogui** (supra). This ground fails as well.

In conclusion, we wish to consider the invitation by the appellant to the effect that the five years she has been behind bars prior to being

sentenced should have been taken into account in sentencing her. We, with respect, decline this invitation. The pre-conviction time spent by the appellant under custody may only be considered as a mitigating factor in sentencing where a discretionary penalty is involved, but it cannot be counted as time served. The appellant was innocent then until the date he was found guilty of the offence. That is when the sentence is supposed to be reckoned from. This is not the first time we are making this observation. We were confronted with an identical prayer in **Vuyo Jack v. The Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported) and observed:

> *"... since the appellant was at the time of arrest not yet convicted, bearing in mind the legal maxim that an accused person is presumed innocent before conviction, he could not be subjected to serve any sentence. The time spent by the appellant behind bars before being found guilty, convicted and sentenced, would have been a mitigating factor in imposing the sentence but not ... to commence from the time of arrest ...."*

We reiterated the standpoint we took in **Khamis Said Bakari** (supra). We are guided by the position we took in the above two cases;

Vuyo Jack (supra) and **Khamis Said Bakari** (supra). In the appeal before us, the sentence imposed on the appellant was not excessive; it is the minimum provided by the law. In the premises, we find no legal reason why we should meddle with it.

The above stated, we find no merit in this appeal and dismiss it entirely.

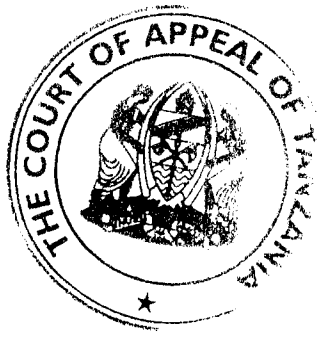
DATED at **DAR ES SALAAM** this 11th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered on this 15th day October, 2021, in the presence of the appellant in person and Ms. Estazia Wilson, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL