IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 362 OF 2019

ALEXANDRIS ATHANANSIOS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar Es Salaam (District Registry)

(Mrango, J.)

dated 14th day of August, 2019

in

Criminal Sessions Case No. 176 of 2016

.....

JUDGMENT OF THE COURT

13th August & 28th October, 2021

FIKIRINI, J.A.:

The appellant, Alexandris Athanansios was indicted in the High Court of Tanzania at Dar Es Salaam, for the offence of Trafficking in Narcotic Drugs contrary to the provisions of section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002, as amended by the Written Laws (Miscellaneous Amendments) (2) Act No. 6 of 2002 (the Illicit Drugs Act). He was tried, convicted, and sentenced to

twenty years in prison and payment of a fine equivalent to three times the value of the narcotic drugs involved that is TZS. 977,400,000/=.

What transpired culminating into the appellant's arraignment, conviction, and subsequently this appeal can briefly be summarized as follows: that on 23rd February, 2014 at Julius Nyerere International Airport (JNIA) within Ilala District in Dar Es Salaam, the appellant, who was travelling to Athens Greece via Zurich aboard Swiss Air, was arrested on suspicion of having carried in his baggage, some narcotic drugs.

On the fateful day at Terminal II international departure area upon screening the appellant's bag, an unusual substance was noticed by Emmanuel Joshua, who was on duty. This prompted him to summon Lucas Marwa Gibore-PW5, a security officer at the JNIA. After a thorough search, John Daudi Qamara-PW4, witnessed by PW5, and the appellant, found the bag zipped at the bottom. And in the presence of PW5, Anna Rajabu, the shift in charge, DCPL/Johnson Sifael, and the appellant, the zip was broken, and therein a black plastic packet smeared with coffee was found at the bottom of the bag. PW4 prepared a seizure certificate, which was admitted in evidence as P7. The appellant who was present during the search and who introduced himself to PW4 as Alexandris

Athanasios, produced his passport, which showed that he was a citizen of Greece. The passport was admitted in evidence as exhibit P6. After signing the seizure certificate the appellant was taken to JNIA Police station, where he was interrogated by PW8. He admitted that he was carrying narcotic drugs in the bag, and recorded a cautioned statement in that regard. The cautioned statement was tendered in court and admitted in evidence as exhibit P8 and the bag as exhibit P5.

PW4 informed his boss, Commissioner Alfred Nzowa, about the incident, and took the retrieved item to the Anti-Drug Unit (ADU) office at Kurasini. At the ADU office, the black plastic packet which was suspected to contain the narcotic drugs was wrapped and sealed, by an Assistant Inspector of police Wamba-PW8, under the instruction of PW4, and in the presence of the appellant, PW4 and witnessed by Amina Mwinjuma Shoko-PW7, a ten-cell leader in the area, who was called as an independent witness.

On 24th February 2014, PW4 in the company of Superintendent of Police (SP) Neema Andrew Mwakagenda-PW6, the exhibit keeper and the one who was later entrusted to keep the plastic packet seized on 23rd February 2014 at JNIA, labeled it No. JNIA/IR/61/2014, took it to the

Chief Government Chemist (CGC). On arrival, PW4 handed the letter and the exhibit at the reception. The exhibit was registered and issued with Laboratory No. 147/2014 and handed to Bertha Fredrick Mamuya-PW1 who passed it on to Gloria Cathbert Omary-PW2 in the presence of PW4, PW6, and other Police officers in the names of Siame and Anastasia. PW2 opened the exhibit, which was in a box, then in a brown envelope, and two layers of nylon bags, one yellow and the other black, collected the substance suspected to be narcotic drugs weighed it, and conducted preliminary testing. The substance weighed 5.43 kilograms, and the preliminary testing conducted, depicted the substance to be heroin hydrochloride. Another small sample was collected for confirmatory tests. The result confirmed the preliminary tests conducted as exhibited by exhibit P3. A packet containing 5.43 kilograms of heroin hydrochloride and the box used to wrap the packet before being taken to CGC were admitted in evidence as exhibits P1 and P2 respectively.

PW1, head of Forensic Services at the Chief Government Chemist laboratory (CGC) repacked the exhibit in the presence of PW4, signed and stamped the box using the CGC stamp, and handed it over to PW4. Back

at ADU, PW6 was handed the exhibit by PW4 for safekeeping in the exhibit room.

The value of the impounded narcotic drugs was determined by Kenneth Kaseke-PW3, now retired Commissioner of Drug Control Commission, and a certificate of value issued on 3rd September 2015, in that regard was tendered and admitted in evidence as exhibit P4.

In his defence, the appellant who testified as DW1, refuted all the prosecution evidence adduced by the eight prosecution witnesses, and some of the exhibits tendered and admitted, showing that he was trafficking in narcotic drugs. His narrative was that he is a tattoo artist who came to Tanzania to attend to his customers. On his way out he was arrested at the JNIA after his rucksack passed through the screening machine indicated there was a problem with his bag. He was asked to open his bag which he did and took out a bottle containing 1.5 litres of boiled water and aloe vera flower mixed with honey, giving camel milk like colour. The product was a medicine used to heal tattoos. He was arrested and after seizing his passport and the bag, which is not his, which had powdery substance believed to be narcotic drugs was also seized. He was asked to sign the certificate of seizure, which he did after

he had read it. In the certificate of seizure, the items listed were one packet of flower suspected to be illicit drugs and his passport. After spending a night at the airport Police station, on the following day he was taken to the ADU where he witnessed the wrapping and sealing of the exhibit. He contended that he signed on the wrapped box after he was forced to do so. From ADU, they proceeded to CGC laboratory where the powdery substance allegedly retrieved from his bag was tested.

In his further defence evidence, DW1 disputed the name appearing in the charge sheet as not his, stating that his name is Athanasios Alexandris and not Alexandris Athanansios. As for the passport tendered in court, he admitted was his, and that his surname appeared first and that, that was how he signed in the certificate of seizure. Challenging the items seized as reflected in the certificate of seizure, he stated that there was no red bag instead there was one packet of flower suspected to be an illicit drug.

Based on the evidence outlined above, the appellant was convicted and sentenced as indicated earlier on. Aggrieved, the appellant has appealed to this Court against the decision. Initially, on 27th March, 2020, the

appellant filed, through his advocate, Mr. Joseph Kipeche learned counsel, five grounds of appeal:

1. *That the trial court erred in law and facts by holding that the appellant did traffic narcotic drugs namely heroin hydrochloride.*
2. *That the trial court erred in law and facts by holding that the chain of custody was not broken from the point of seizure, analysis to being tendered in court.*
3. *That the trial court erred in law and facts by holding that the defence case did not manage to raise any reasonable doubt against the prosecution case.*
4. *That the trial court erred in law and facts by holding that the charges against the appellant were proved by the prosecution beyond reasonable doubt.*
5. *That the trial court erred in law and facts to convict and sentence the appellant while the case was not proved beyond reasonable doubt.*

On 12th May, 2020, however, the appellant filed a supplementary memorandum of appeal containing nineteen grounds and several sub-

grounds. The grounds have been combined into seven clusters namely: First, cluster covered grounds number 1, 2, 3 & 4 as all were centred on the charge sheet contending that the statement of offence contains non-existing provision of the charged offence and the variations of the particulars of the offence and the evidence.

The second cluster covered grounds 5 (i) and (ii) on the failure by the trial Judge to append signature after examination in chief and cross-examination of witnesses and failure of the interpreter to lay a foundation of his credentials before interpreting. The third cluster covered the appellant's ground numbers 6 and 8, 9, 10, 12, 13, 14 & 16, complaining about the chain of custody of exhibit P1 (5.43 kg of heroin hydrochloride) and P2 (red bag). On the fourth cluster covering the 11th ground, the appellant complained about the unprocedural seizure and improperly prepared certificate of seizure. In the fifth cluster covering the 15th ground, the appellant complained about the reliance on a repudiated cautioned statement to convict the appellant. The sixth cluster covered ground number 18 which was a complaint about the credibility of PW5. And the seventh cluster covering grounds numbers 7, 17, and 19 was on proof of the case to the required standard.

Aside from the supplementary grounds of appeal filed by the appellant as shown above, on 9th August, 2020, Mr. Kipeche filed written submissions. In his submissions, he clustered the submissions into four parts combining the grounds of appeal filed initially and supplementary grounds filed later. He dropped the first ground of appeal and dealt with the rest.

The appeal was scheduled for hearing on 13th August, 2021. At the hearing, Ms. Veronica Matikila, learned Senior State Attorney assisted by Ms. Jaqueline Nyantori, and Ms. Clara Charwe, both learned State Attorneys, appeared for the respondent whereas Mr. Joseph Kipeche assisted by Ms. Juliana Douglas Lema both learned counsel appeared for the appellant. The appellant who wished to be present at the hearing appeared via a Video link from Ukonga Central Prison.

To get the ball rolling, Mr. Kipeche adopted the written submission already filed as part of his oral submission. When prompted by us, under which provision of the law he was moving the Court, Mr. Kipeche invited us to invoke the Oxygen Principle as well as Rule 4 (2) (a) of the Tanzania Court of Appeal, Rules 2009 as amended (the Rules). Ms. Matikila had no

objection to the prayer and we granted the prayer under Rule 4 (2) (a) of the Rules.

Expounding on few areas, he commenced with the clustered grounds in Part 2, comprising an argument on the chain of custody which is covered in ground 2 of the grounds of appeal and grounds 6-14, 16, and 18 of the supplementary memorandum of appeal, and in Part 4 comprising of an argument that the case was not proved beyond reasonable doubt which is covered in grounds 3, 4 and 5 of the grounds of appeal as well as grounds 17 and 19 of the supplementary memorandum of appeal. It was his submission that the chain of custody as exhibited in exhibit P1 was flawed as it had no documentation. He referred us to the case of **Alberto Mendes v R,** Criminal Appeal No. 473 of 2017 (unreported).

He further submitted that the case was not proved beyond reasonable doubt assigning the following reasons: one, that there was a contradiction in the testimonies of material witnesses, giving an example of PW7's testimony that the colour of the exhibit P1 was cream while PW1 testified that it was light brown. Two, PW6 at page 86 of the record of appeal was stated to testify that the person who conducted the

preliminary test was Gloria Omary Machive whereas PW2 on page 59 of the same record named the person as Gloria Cathbert Omary. According to Mr. Kipeche it was not clear if these were the same person. Three, that PW8 testified that he wrapped and sealed the exhibit P1 at 9.30 hours in the presence of PW7, whereas PW7 stated to have been called to go and witness the process at 11.00 hours. Urging us to allow the appeal, Mr. Kipeche submitted that the said contradictions raised doubts leading to the conclusion that the case was not proved beyond a reasonable doubt.

When prompted on the first part of the appeal comprising the defect on the charge sheet, he responded that the person charged was Alexandris Athanansios while the appellant's name is Athanasios Alexandris as reflected on page 227 of the record of appeal and in exhibit P6 (the appellant's passport) and therefore the named person in the charge sheet and the one before the Court were not the same. Mr. Kipeche thus urged the Court to allow the appeal, quash the conviction, set aside the sentence, and set the appellant free.

Responding to the appeal, from the outset Ms. Matikila opposed it and supported the conviction. Her reply submission followed the clustered parts as filed by the appellant. Arguing the first part on the defective

charge sheet, she outright contended that the charge sheet has no defect. Directing us to page 42 of the record of appeal, where the statement of the offence is reflected, and where also the information which was filed before the High Court appears, Ms. Matikila argued that the statement and particulars of the offence had enough information to enable the appellant to understand the offence he was charged with. Ms. Matikila admitted that there was a typo error, and she was however quick to submit that the additional words "*Written Laws (Miscellaneous Amendments) (2) Act. No. 6 of 2002*" could not have prejudiced the appellant. She, in fortifying her submission referred us to the case of **Samwel Paul v R,** Criminal Appeal No. 312 of 2018 (unreported) p. 13.

On the issue of names, it was her submission that the issue has been resolved in terms of section 192 (4) of the Criminal Procedure Act, R.E. 2002 (now R.E. 2019) (the CPA) during the Preliminary hearing as reflected on pages 48 – 49 of the record of appeal. More so, the defence admitted that exhibit P6 was the appellant's passport. Therefore, the charge sheet was proper and there was no variance of evidence to the charge preferred against the appellant. She further submitted that the cases of **Fatehal Manji v R** [1996] E.A. 343 and **Filbert Alphonce**

Machalo v R, Criminal Appeal No. 528 of 2016 (unreported) are distinguishable as they addressed the issue of acquittal and retrial which was not the issue in the present appeal. Underscoring her position, she contended that even if it was correct that the charge was defective, the fact which was not correct, yet the remedy would have been retrial and not an acquittal.

Canvassing on parts 2 and 4 which she addressed together, which was on the chain of custody and that the case was not proved beyond reasonable doubt respectively, she began by dealing with the issue of documentation of exhibit P1, which the appellant had argued that there was no proper documentation from the point of seizure up to the time of the exhibition in court. She responded that not being a requirement as oral evidence could as well suffice. She invited us to take inspiration from our own decision in the case of **Marceline Koivogui v R,** Criminal Appeal No. 469 of 2017 (unreported). Distinguishing the facts in **Alberto Mendes's** case (supra) to those in the present appeal, she contended that in the cited case there was a contradiction between the Police officers who handled the seizure, leading the court to opine that documentation could have resolved the contradiction. She also cited for

us the case of **Abas Kondo Gede v R,** Criminal appeal No. 472 of 2017 (unreported), in enhancing her point that the chain of custody in the present appeal was intact and not broken.

The appellant in his submission alleged that what was seized is not what was brought to court. Ms. Matikila contended this was a misconception of facts as there was nothing from the proceedings contradicting the number of packets in the case. Agreeing that there were two types of nylon bags mentioned by the prosecution witnesses, one being yellow and the other black, and then the khaki envelope, but nowhere in the record, it has been referred as to separate packets. Instead, the counsel explained, the packet was in two separate nylon bags, one in another as testified by PW2, PW4, PW5, PW7, and PW8 as shown on pages 61, 62, 71, 79, and 93 of the record of appeal.

On the failure to give a proper description of what was seized, she contended that the packet was properly identified by each witness who dealt with the exhibit. Elaborating her submission, she pointed out that PW4 who seized the packet described it as a packet that was black smeared with coffee. His evidence was corroborated by PW5 who witnessed PW4 retrieving the packet from the appellant's bag. On page

81, PW5 explained his failure to identify the colour that it was due to the fact that the packet was smeared with moistened coffee. Under the circumstances, she argued it was difficult to fully describe the seized packet. Justifying her stance, she referred us to pages 71, 79, and 81 of the record of appeal. Countering the challenge that PW1 was not able to identify exhibit P1, Ms. Matikila submitted that, PW1's account was to the extent as to how he handled the exhibit. That at the time he seized it, the substance was packed in a black bag. The description given by PW1 was thus sufficient. She further contended that PW1 was later called to repack and seal the exhibit, which she managed to identify before the court based on her signature and stamp from her office. Buttressing her point, she urged us to take inspiration from the case of **Deus Josias Kilala v R,** Criminal Appeal No. 191 of 2018 (unreported).

Contradiction on the colour of the exhibit P1 raised by the defence was countered by Ms. Matikila submitting that the two colours, cream and light brown described by PW1 and PW7, was not a serious difference as the two colours were from the same shade. Moreover, the suspected substance was in a yellow nylon bag which could have made it difficult to

tell exactly the colour and after all, each witness testified on what they saw and nothing else, argued Ms. Matikila.

On the chain of custody, Ms. Matikila impressed upon us that the chain of custody was intact as rightly found by the trial court. PW6 testified that exhibit P1 was throughout in her custody until when it was exhibited in court, therefore the assumption that there was tempering has not been shown and thus should not be entertained. She likewise, urged us to disregard the contention that PW2 did not explain with clarity how the confirmatory test was conducted. It was her submission that the explanation given by PW2 was sufficient for the court to understand and hence no need to go through the whole chemistry involved, as PW2 did describe the method involved properly. And that if at all the defence had any question, they ought to have used the opportunity afforded to cross-examine the witness which they did not. At this point what the appellant, who was represented by three different counsels, was doing, cannot be depicted otherwise except an afterthought, concluded Ms. Matikila. Citing the case of **Chacha Jeremiah Murimi & 3 Other v R,** Criminal Appeal No. 551 of 2015 (unreported) and **Deus Josias** (supra), she argued that the effect of failure to cross-examine means that the fact has been

accepted and was thus her contention that the allegation that no scientific analysis or explanation made, was thus baseless.

Admitting that after it was impounded, exhibit P1 was placed under Police all along, but to her, that did not necessarily mean the chain of custody was interfered with. PW4 was present during the seizure, wrapping, and sealing. In compliance with the Police General Orders (PGO) and particularly to paragraphs 229 4(a) and (c), 6 (f) and 8 on the handling of the exhibits, including marking it, Ms. Matikila conceded that compliance was necessary, but submitted that the exhibit could not be marked by an investigator at the scene of crime, that however, did not break the chain of custody by not inserting the case number then. She cited the case of **Abdallah Rajabu Mwalimu v R**, Criminal Appeal No. 361 of 2017 (unreported), to support her submission. She was also prompt to urge us that if we find that there was a failure to comply with the requirement stipulated in the PGO, then we should find such omission as not fatal.

On the claim that exhibit P1 was not opened before the court, Ms. Matikila denounced the statement as not true. She referred us to page 58 of the record of appeal, that when PW2 was testifying exhibit P1 (the box

containing the substance) was permitted to be opened. And that by PW2 stating that this is the flour brought to the CGC for investigation, it means the box was opened. The assertion has been as well reflected in pages 59, 93, and 94 connoting that the box was opened and the content in there was powdery substance, added the learned Senior State Attorney.

The defence also complained that the seizure was not properly done as there was no documentation. Acknowledging this fact, Ms. Matikila submitted that the seizure was conducted under an emergency that could not allow proper compliance with the requirement stipulated under section 38 of the CPA as evidenced by the evidence of PW4 and PW5. This is so as ADU had no prior knowledge and thus could not prepare themselves with seizure notes and search warrants. She submitted that in that kind of situation, PW4's resort to preparing a handwritten document instead of a prescribed form was not fatal. After all, the appellant admitted signing the handwritten seizure note without challenging its contents, therefore not being issued with a receipt was not fatal, she concluded.

Addressing the use of words "flower" and "flour" which raised controversy, Ms. Matikila submitted that to be a mere slip of a pen, as

PW4 clarified on that on pages 75 and 77 of the record of appeal and PW2 did so as well at page 63. On the issue of the difference of time on when the sealing of exhibit P1 occurred, Ms. Matikila agreed that the difference in time existed but was quick to say that the time stated was within the same time frame and also that the difference did not go to the root of the matter and likewise did not prejudice the appellant, referring us to the case of **Deus Josias** (supra), that a witness cannot remember everything.

The name of the person who did the tests at the CGC was also contested. While PW1 referred to the person as Gloria Omary, PW6 referred to her as Gloria Machive as reflected on page 86 of the record of appeal. After all, the actual name was given by PW2 who conducted the tests and analysis, and also no one cross-examined on PW2's name, submitted the counsel. This aside from not being a contradiction, but even if it was it did not go to the root of the case, argued Ms. Matikila.

Cautioned Statement admitted as exhibit P8 was as well an issue. It was challenged on account of having been recorded in contravention of the provisions of sections 50 and 51 (1) (b) of the CPA. Admitting the defect, Ms. Matikila urged us to expunge it from the record of

proceedings. She went on submitting that even after expunging the cautioned statement, the remaining evidence was still strong and sufficient to sustain the appellant's conviction.

Concluding her submission, the learned Senior State Attorney, invited us to consider the sentence meted out. It was her submission that the offence was committed after 2012. Even though the Republic has not filed a cross-appeal but pressed that we look into it. Otherwise, she considered the appeal is without merit and prayed for the conviction to be upheld and the sentence be enhanced from twenty years to life imprisonment.

In rejoinder, Mr. Kipeche essentially reiterated his earlier submission save for a few clarifications he wished to make. On the defective charge, it was his submission that the prosecution has admitted and the defect was fatal which cannot be cured under section 27 of the Interpretation of Laws Act, Cap. 1 R.E. 2019 (the ILA). Also that non-compliance with section 135 of the CPA which required the charge to be with proper citation, that the defect had prejudiced the appellant. Referring to page 48 of the record of appeal, the appellant's name as reflected in exhibit P6, appeared as Athanasios Alexandris, the name which is different from the

one appearing on the charge sheet. The legal requirement is that the charge sheet should state the correct names of the appellant, stressed Mr. Kipeche.

Responding to the chain of custody submission, Mr. Kipeche insisted that it needed to be documented, distinguishing the case of **Marceline Koivogui** (supra) in which oral evidence was allowed to prove chain of custody. Similarly, when was exhibit P1 sealed, he considered the difference not minor but the one which touches the credibility of PW8. He as well considered the submission that PW2 was not obligated to give a scientific explanation on how she conducted the test and analysis that followed, is not fatal, he argued that PW2 being an expert, had a duty to do that, regardless of whether she was cross-examined or not.

Non-compliance with section 38 (3) of the CPA, was equally taken up as fatal by Mr. Kipeche, arguing that no reasons were given for not complying. On the terms "flower" and "flour" as indicated in exhibit P7 recorded by PW4, Mr. Kipeche, highlighted to us that he found it strange considering PW4 was very experienced.

Before winding up his rejoinder, Mr. Kipeche was probed on the propriety or otherwise of the sentence. He conceded that the same is not

in compliance with the law and that after the amendment to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, the offence currently attracts life imprisonment.

Having considered the evidence and submissions from the parties, we now proceed to determine the appeal, starting with the first cluster on the defect of the charge sheet and the appellant's name. In his written submission, Mr. Kipeche cited the case **Musa Mwaikunda v R** [2006] T.L.R. 387, that it is a legal requirement in terms of section 132 (1) of the CPA, that the appellant is supposed to know the nature of the case he was facing and this could have been achieved from the charge sheet, which contained sufficient information about the charge against the appellant. We agree with Mr. Kipeche that it is pertinent for the appellant to know the nature of the case he was facing, but we equally agree with Ms. Matikila that, the appellant understood what he was being charged with after the charge was read over and explained to him at the trial. More so, the first part of the information relating to the charging provision was informative enough.

A proper citation of the laws which in this case should have been the "Written Laws (Miscellaneous Amendments) (No.2) Act, 2012", and

not "Miscellaneous Amendments (No. 2) Act No. 6 of 2002", would have been the correct way. However, we find the charge sheet was valid even without the extra information regarding the amendment. The omission is in our view not fatal, and on this, we are guided by the case of **Samwel Paul** (supra), cited to us by Ms. Matikila, faced with the same scenario, the Court held:

> *"We are aware that, it is a practice in such situations to add "as amended by Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011" in the statement of offence, but we find failure to do so is not fatal and does not go to the substance of the charges to warrant this Court to find the charge wanting....."*

Compliance with sections 132 and 135 (a) (ii) of the CPA is significant as the provisions illustrate on contents of the charge sheet, the manner, the format, and the requirement on the statement of the offence to refer to the correct provision and so forth. The charge sheet preferred against the appellant in the instant appeal has undoubtedly been complied with save for the minor omission stated above and which did not go to the root of the matter at issue.

We have taken into consideration the provisions of section 27 of the ILA cited to us by Ms. Matikila. That provision states as follows:

> *"Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof and unless the contrary intention appears, be construed as one with the amended Act."*

We agree with her argument that since the amended section was properly cited the addition of the amending Act was unnecessary. In the case of **Karimu Jamary @ Kesi v R,** Criminal Appeal No. 412 of 2018 (unreported) cited in the case of **Samwel Paul** (supra), reinforces our position that:

> *"..... the prosecution had no obligation to indicate that the appellant was charged under section 287A of the Penal Code as amended by Act No. 3 of 2011."*

Since the particulars of the offence were clear and the appellant was able to understand the charges leveled against him and be able to mount his defence it is obvious that he was not prejudiced at all.

On the issue of names, this will not detain us long. The arrangement of the appellant's name was the outcome of the document

which was relied upon to know him. In exhibit P6, the names appear as Alexandris Athanasios, Alexandris being a surname and Athanasios his given name. It was therefore clear that PW4 recorded the names as they appear in the passport. Furthermore, exhibit P7 (seizure certificate), signed by the appellant on 23rd February, 2014, right after he was arrested, shows that the appellant signed his name as Alexandris Athanasios. On page 140 of the record of appeal, the appellant acknowledged signing exhibit P7 after he had read it. In his own words which speak volumes he said:

> *"In that office one officer was writing a certificate of seizure.* ***I read it and signed it.****"* [Emphasis Added]

If the appellant admitted to signing exhibit P7 after reading it, it means he accepted all the information therein to be correct including the arrangement of names.

Despite the claimed incongruity, the appellant never raised any objection concerning the variance in names. Looking at page 48 of the record of proceedings, when the preliminary hearing was being conducted in compliance with section 192 of the CPA, the appellant admitted his

name and passport (exhibit P6). That resolved the issue on the appellant's name and he was bound by the dictates of section 192 (4) of the CPA which states:

> *"Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."*

The prosecution had no further obligation of procuring witness to that effect. The asserted variance between the charge sheet and the evidence by Mr. Kipeche was thus an afterthought.

On the second and fourth grounds, the appellant complained that the chain of custody was broken and proof of the case was not beyond a reasonable doubt. There was indeed no documentation from the point of seizure to when the impounded drugs were exhibited in court. Under normal circumstances, documentation is usually the best way to procure

and preserve evidence but is not the only way or not purely mandatory. In situations where it is not possible, oral evidence establishing an untainted chain of custody is allowed. Mr. Kipeche picking on that and challenging lack of documentation referred us to the **Alberto Mendes** case (supra) while Ms. Matikila referred us to the case of **Marceline Koivugui** (supra). Under the circumstances of the present appeal, we find that lack of documentation has not discredited or tainted the chain of custody.

Both cited cases of **Alberto Mendes,** and **Marceline Koivogui** acknowledged the settled legal position, that documentation and oral evidence to establish the chain of custody are both reliable ways depending on the nature of the case. Whereas, the Court considered the importance of documentation in compliance with PGO No. 229, as most of the witnesses who handled the exhibit were Police officers, in the **Alberto Mendes** case, in **Marceline Koivogui** the Court relaxed the requirement illustrated in **Paulo Maduka's** case.

Coming to the appeal before us, we find the chain of custody intact and not broken in any way. Exhibit P1 was seized from the appellant on 23rd February, 2014 at JNIA and stored at ADU airport offices by PW4 and

on 24th February, 2014 was taken to ADU Kurasini by PW4 and was sealed by PW8 in the presence of an independent witness. From there it was taken by PW4 accompanied by PW6 to the CGC premises, received by PW1 who later handed the exhibit to PW2 who weighed the substance and did a preliminary test which indicated that the substance was narcotic drugs known as heroin hydrochloride and did confirmatory tests later. PW2 repacked the exhibit and handed it to PW4 who carried it back to the ADU office at Kurasini. PW6 took over by registering the information in the exhibit register and kept the exhibit in the exhibit room until finally the exhibit was produced in court by PW1 during the trial. PW6 testified that exhibit P1 was in her custody throughout after coming back from the CGC where it was taken for preliminary and confirmatory tests later. The chain was well established and nowhere was the same broken.

We thus do not agree with Mr. Kipeche that lack of documentation had an impact on the chain of custody and weakened the prosecution case. Whilst in **Alberto Mendes** there was a contradictory account from the Police officers who handled the exhibit, whereas there was none in the present case. That case is thus distinguished.

The appellant also challenged the evidence on the seizure at the JNIA, of the drugs substance from the appellant's bag on account of failure by the prosecution to tender the bag before the court. There is abundant evidence as portrayed above on how the drugs were retrieved and impounded from the appellant's bag. The substance was proved to be a drug known as heroin hydrochloride, weighing 5.43 kilograms. PW2 carried out the preliminary as well as the confirmatory tests as shown on page 61 of the record of appeal. The preliminary test was carried on 24th February, 2014 in the presence of PW4, PW6, PW8, and other witnesses as indicated on page 60 of the record of appeal. The very substance which was in powdery form is what was brought before the court during the trial. The box was opened as testified by PW2 as shown on page 58 of the record of appeal. PW2 on page 63 further testified on exhibit P1 being opened before the court. At this juncture, we find it apposite to allow the record of appeal to speak for itself.

> *"This is the box (exhibit P2). This is the black nylon and this is the yellow plastic bag. The box bears the lab number. I have mentioned, PW1 signature the rubber stamp and the date it was received i.e 24th February, 2014. The lab number*

is 147/2014. Also the powder, the narcotic drug is heroine hydrochloride."

From the above account, it is clear that exhibit P1 was opened and shown to the court, although the record is not explicit. We have no reason to doubt the narrative, which was not discounted in cross-examination. Had the box been not opened and the nylon bags were taken out and PW2's description as shown on page 58, Mr. Kipeche's suspicion would probably have raised a doubt.

Regarding whether what was seized was "flour" or "flower", this should not detain us long. PW2 on page 63, stated that the suspected drugs were in powdery form. The best evidence in our view comes from PW4 who on pages 75 and 77 has clarified that. On page 75 this is what he said:

"I used English languages to prepare the exhibit P7. The certificate bears the word flower, I meant flour or powder in Swahili "unga" and elaborate it as an illicit drug. I seized the powder from the accused in this case....."

Again, on page 77 when cross-examined by Mr. Manyama learned counsel, PW4 clarified the mix-up when he replied by saying:

"The certificate of seizure connects the suspect with the offence. Flower I meant flour (unga)."

The unbroken chain of custody has been elaborately accounted for orally. The evidence led has proved what was impounded at JNIA on 23rd February, 2014 from the appellant was narcotic drugs. The suspected drugs were securely kept, transported to CGC where it was proved was heroin hydrochloride and not flower, as the defence wanted to pick on, and later produced and opened in court.

There might have existed contradicting accounts here and there in the record of appeal but they are explainable. On the evidence that there were two or three bags mentioned by witnesses: black, yellow, and khaki, despite such reference there is, however, nowhere the three bags were referred to as three separate packets. On page 61 when PW2 was testifying this is what she stated:

"It was a box containing a brown envelope, a nylon bag, another nylon bag and then powdery materials (substance)....."

From the testimony, it means that the bags were inside one another and not two separate bags. The same statement was restated on page 62 of the record of appeal. PW4, the arresting officer on page 71, equally

had the same testimony that they removed a packet black in colour. PW5 too on page 79 testified to have witnessed PW4 removing a black bag from the suspect's bag.

Another contradiction pointed out was on the identification of the colour of the plastic bag. PW5 when testifying on page 81, he stated that he could not describe the exact colour as the nylon bag was smeared with moistened coffee. This explanation in our considered view, was fair, based on what the witness exactly experienced, that the bag was smeared with coffee. The fact that there was a presence of coffee on the retrieved bag was admitted by PW4 as seen on page 71. The varied colour description which was made by PW1 and PW7, in their testimonies, that the colour of the powdery substance was cream while PW7 accounted it to be light brown, was inconsequential. In our view, the cream is another way of saying light brown, since the two are from the same shade of colour. Furthermore, different people have different ways of describing colours, not all share the same understanding and description.

On the difference of time when exhibit P1 was sealed as described by PW7 and PW8, it is evident from the record such difference existed.

Whereas PW7 mentioned time to be 11.00 hours, PW8 said it was at 9.30 hours. We are once more, of the settled view that the time frame involved is not that expansive, has not gone to the root of the case and certainly, it has not prejudiced the appellant.

Similarly, on the contradictions on PW2's name, besides, not going to the root of the case, the identity of who did the test was never at issue. More so, even PW1 on pages 56-57, simply named her as Gloria Omary, while during her testimony, PW2 introduced herself as Gloria Cathberth Omary. What PW2 stated as her name is what matters, as she was the one who conducted the tests and analysis later leading to preparing exhibit P3.

As for PW1 that she could not identify each item, this challenge is as well covered. It has to be recalled that PW1 stayed with exhibit P1 shortly before handing it over to PW2. She was later called to come and seal it. While testifying in court as reflected on page 58, she managed to identify her signature, the identification number 147/2014, and the stamp of her office. Of course, the time has since passed for one to remember everything with clarity, therefore, whatever the witness remembers must be taken into account. We are fortified in our position, by the previous

decision of this Courtin the case of **Deus Joasis Kilala** (supra), cited to us by Ms. Matikila, where the Court held:

> *"This Court observed that regularly in all trials, normal contradictions or discrepancies occur in the testimonies of witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition ...."*

The Court did not end there but went further explaining on material contradiction or discrepancy which any court of sound mind would consider by elaborating as follows:

> *"...material contradiction or discrepancy is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized.""*

Minor contradictions or discrepancies, if any, which do not go to the root of the case need not matter. See also: **Mohamed Saidi Matula v R** [1995] T.L.R 3, **Dickson Elia Nsamba Shapwata v R,** Criminal Appeal No. 92 of 2007, and **Alex Ndendya v R,** Criminal Appeal No. 207 of 2018 (both unreported).

The defence argued that failure to give proper description was fatal, while the prosecution said it was not. We say the prosecution witnesses each testified on what they saw at the scene of crime and later at the ADU Kurasini offices and CGC premises. Nothing was added. The appellant was represented by three defence counsels, who had the opportunity of cross-examining each witness after their testimony but did not. There are a plethora of authorities on that including **Damian Ruhule v R,** Criminal Appeal No. 510 of 2007, **Nyerere Nyague v R,** Criminal Appeal No. 67 of 2010, and **George Maili Kemboge v R,** Criminal Appeal No. 327 of 2013, to mention a few. All that the defence is raising is surely an afterthought.

Non-compliance with section 38 (3) of the CPA and PGO 229 4 (a) and (c) and 6 (f) which regulates the handling of an exhibit, was also complained about by the appellant. It was Mr. Kipeche's argument, referring us to the **Alberto Mendes** case (supra), that there was no evidence showing that exhibits P1 or P5 were labeled by experienced Police officers. He thus contended that the probative value of the evidence of the exhibits is questionable, raising doubt on PW4 and PW5's account.

Ms. Matikila, admitted that compliance with section 38 (3) of the CPA and regulations in the PGO was important but submitted that failure to comply was not fatal. She argued that in the present instance, ADU had no prior knowledge that there would be arrest, hence could not prepare themselves, as a result, had to come up with exhibit P7 a handwritten seizure certificate, and unmarked exhibits. She thus urged us to disregard the complaint questioning the safety and integrity or faulting seizure and failure to insert of case number on exhibit P1. Supporting her argument, she referred us to the case of **Abdallah Rajabu Mwalimu v R,** Criminal Appeal No. 361 of 2017 (unreported) page 25.

Compliance with the requirements as provided in section 38 (3) and Regulation 229 of PGO, both giving directions on how the exhibits are to be handled and marked is important. However, in certain circumstances, necessary modification on how the requirement is to be observed is provided. Like in the present appeal, where the application of the Illicit Drugs Act, ought to have also been considered. Particularly the provisions of sections 30 (1) (c), 37, and 39 of the Act.

We are of the view that even though compliance with the dictates of section 38 (3) of the CPA and the PGO, is important, but we find failure to

observe the requirement is not fatal as described by Mr. Kipeche. In short we are in agreement with Ms. Matikila. Furthermore, we have as well given attention to the provisions referred above of the Illicit Drugs Act. This stance is taken based on the following, that exhibit P1 which was later proved to be heroin hydrochloride was seized at the JNIA, by PW4, in the present of PW5. All prosecution witnesses each gave an account of what transpired at different stages of processing the seizure of exhibit P1 and the arrest of the appellant. The drugs were seized by PW4 who is mandated under section 30 (1) (c) of the Illicit Drugs Act. This was in the presence of PW5, Anna Rajabu, the shift in charge, DCPL-Johnson Sifael, and the appellant and other witnesses as indicated from pages 70 -71 of the record of appeal. As an authorized officer in terms of section 37 (1), PW4 a Police Officer was the appropriate person to keep the drugs, as he did by keeping them in the drawer at the ADU office. He was the only person who had access and keys to the drawer. The following day he informed his boss the Commissioner, at the same time instructing PW8 to wrap and seal the exhibit P1, ready for it to be taken to CGC for testing. Exhibit P1 was wrapped and sealed by PW8 in the presence of the

appellant, PW4 and PW7, an independent witness. And all these occurred within forty-eight hours prescribed under section 39 of the Act.

Although marking occurred after the exhibit came back from the CGC, we nonetheless do not think the authenticity of exhibit P1 was in jeopardy as suggested by Mr. Kipeche. We say so because, aside from the procedure provided under the Illicit Drugs Act, there was evidence of the participation of more than one witness at every step of the way elucidating what transpired. Even though the appellant declined to be present, but this assertion is refuted, as no question was put across during cross-examination of PW4, PW6, PW7, and PW8. It is a settled legal position that failure to cross-examine means the facts stated are not contested. See: **Chacha Jeremiah Murimi** and **Deus Kilala** (supra). In the circumstances, we likewise, find that the appellant's failure to cross-examine the witness on such a critical issue connotes to us that the fact at issue was accepted. Raising that at this later stage is nothing but a postscript.

All the above explanation underscores the fact that the chain of custody was intact, regardless of the seizure certificate being informal.

Moreover, the appellant as reflected on pages 140-141 of the record of appeal never contested the contents in exhibit P7.

At the trial, the appellant's cautioned statement was tendered and the same was received in evidence as exhibit P8. Mr. Kipeche did not contest this fact. We have as well scrutinized the record; it is evident that the appellant repudiated his statement as shown on page 142 of the record of appeal. We agree with Mr. Kipeche and Ms. Matikila, that the recording contravened the dictates of section 50 (1) (b) and 51 of the CPA. The statement deserves expunging from the record of the proceedings, and we proceed to do by expunging the same from the record of proceedings. However, despite expunging the ill-gotten cautioned statement, the remaining evidence is still strong against the appellant.

Examining the evidence on record in its totality we find, despite minor contradictions and discrepancies, that there was tight evidence of an unbroken chain of custody. Equally, we are at one with the learned trial Judge that the prosecution proved its case beyond a reasonable doubt. We thus sustain the conviction and dismiss the appeal in its entirety.

Aside from the grounds of appeal raised and dealt with, there was a legal issue raised by Ms. Matikila on sentence. She contended that the sentence meted out to the appellant was illegal considering that the offence was committed after Written Laws (Miscellaneous Amendments) (No.2) Act, 2012, had become operational. Mr. Kipeche admitted that the amendment changed the sentence to a minimum of life imprisonment.

In the light of what we have just expressed, we hereby enhance the sentence to life imprisonment.

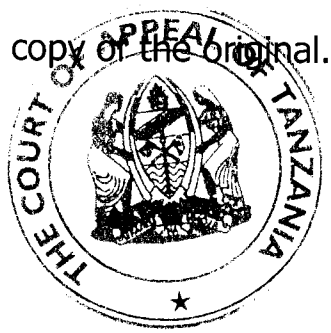
DATED at **DAR ES SALAAM** this 25th day of October, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered on this 28th day October, 2021, in the presence of Ms. Juliana Doglas Lema, learned counsel for the appellant and appeallant linked via video conference from Ukonga Central Prison and in the absence of the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL