IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 76 OF 2020

(CORAM: LILA, J.A., KITUSI, J. A. And MASHAKA, J.A.)

MYCHEL ANDRIANO TAKAHINDENGENG..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Matupa, J.)

dated the 12th day of December, 2019

in

HC. Criminal Session Case No. 152 of 2015

.....

JUDGMENT OF THE COURT

5th July & 11th August, 2022

KITUSI, J.A.:

Mychel Andriano Takahindengeng is serving life imprisonment after the High Court convicted him with Trafficking in Narcotic Drugs, an offence under 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) Act (No. 2) Act No. 6 of 2012, hereafter referred to as the Act. This is an appeal against the said conviction and sentence, and we shall henceforth refer to him as the appellant.

There was no dispute that the appellant, an Indonesian, had been in Tanzania from 6th August, 2012 and was set to leave the country on

12th August, 2012 for other destinations. It is alleged that the events that led to the case from which this appeal originates, took place on the latter date.

The prosecution's case was that on 12th August, 2012 while the appellant was checking in at the Julius Nyerere International Airport (JNIA) ready for departure, his baggage was subjected to the usual screening. Nicas Wilbert (PW5) who was operating the screening machine, noticed a suspicious image in one of the bags and he instructed Burhan Salim Hamis (PW6) a security officer, to conduct a physical search of that bag. As the appellant did not heed to instructions to open the bag, PW6 opened it himself in the presence of Hyasinta Elia Lyimo (PW7) a police officer stationed at the JNIA. From that bag, PW6 and PW7 retrieved four packets which contained what they suspected to be narcotic drugs, a suspicion that was later confirmed through scientific tests conducted by the office of the Chief Government Chemist (CGC).

The appellant was thus charged, convicted and sentenced as alluded to earlier. In challenging that decision, the appellant has raised fifteen grounds in the original memorandum of appeal and nine grounds in the supplementary memorandum of appeal. He however dropped six

grounds of appeal from the original memorandum of appeal which are grounds 1, 9, 10, 11, 14 and 15. He sought to merge the remaining grounds of appeal, that is grounds 2, 3, 4, 5, 6, 7, 8 12 and 13 with those in the supplementary memorandum of appeal.

Upon our keen reflection however, we are satisfied that the remaining grounds of appeal raise issue with the following areas:

1. Ownership, search and seizure of the bag containing the suspected drugs.
2. Initial handling and chain of custody of the suspected drugs.
3. Contradictions of the prosecution witnesses on some salient features of the evidence.
4. Admissibility of exhibits P5 (the alleged drugs), P6 (the bag) and P7 (statement of a witness who was not available to testify).
5. Consideration of the defence case.
6. Proof of the case beyond reasonable doubt.
7. Propriety of the sentence.

The appellant prosecuted the appeal himself without legal representation by presenting lofty written arguments, which we shall be referring to. He stood by those submissions without more, and prayed

that we allow his appeal, quash the conviction and set aside the sentence that was imposed.

On the first area of complaint, the appellant submitted that the narcotic drugs tendered as exhibit P5 have no evidential value because the officers who dealt with it at the initial stage PW5, PW6 and PW7, though experienced on their official duties, ignored the dictates of section 38 (3) of the Criminal Procedure Act (the CPA). This very common procedural law requires that after seizure of a suspected item, the officer concerned should prepare a seizure certificate to be signed by the suspect and other witnesses. His argument is that credibility of exhibit P5 begins right at the time of seizure and he cited the famous case of **Paulo Maduka & 4 Others v. Republic**, Criminal Appeal No. 110 of 2007, to demonstrate the consequences of violating section 38 (3) of the CPA.

Submitting further, the appellant stated that his arrest and search as well as the seizure of the alleged drugs could not have been an emergency because PW5, PW6 and PW7 who handled the initial process are permanently stationed at the JNIA to handle such cases, and would therefore be in possession of the relevant documents, all the time.

The appellant appreciated the fact that the trial court relied on the oral testimonies of PW5, PW6, PW7 and PW8. However, he argued that these witnesses were unreliable because they were contradictory in their testimonies. He cited a number of contradictions. One, there was no common story as to which witness saw the appellant place the suspected bag on the scanner machine. Initially, PW7 said she saw the appellant do so, but later she admitted that she was not close to the machine and that PW5 is the one who saw the appellant put the bag on it. Two, there is contradiction as to who labeled the four packets "A" "B" "C" and "D". He pointed out that PW5 did not know who labeled the packets while PW7 said they were labeled by PW8. However, in his evidence, PW8 denied being the one who labeled those packets. Even PW2, the exhibit keeper, denied being the one who labeled the packets. Similarly, PW6 denied any involvement in the packing of the alleged drugs and labeling them. The appellant's arguments raise the following three questions: which he invites us to address:

> *"One, were the four parcels retrieved from the appellant? Two, was (sic) the four parcels marked/labeled "A" "B" "C" "D" by the appellant? Three: who (which of the officers) labeled the four parcels (Exhibit P5)? The questions above were not answered anywhere in the court record*

by any of those witnesses and will never be answered".

The appellant cited the case of **Alberto Mendes v. Republic**, Criminal Appeal No. 473 of 2017 (unreported), to support his argument that violation of section 38 (3) of the CPA and PGO 229 is fatal to the case.

The appellant picked a third area of contradiction that is in relation to the bag, which had three instances within. One instance was about the contents of the bag, the other was in relation to the number of the bag(s) and the third was on the colour of the bag. Was the bag white or black? Was it one bag or more than one? Asks the appellant.

The respondent Republic was represented by Ms. Janethreza Kitaly and Ms. Annunsiatha Leopold, both learned Senior State Attorneys. It was Ms. Leopold who responded first, arguing grounds 2 and 5 in the memorandum of appeal together with ground 3 in supplementary grounds of appeal. These grounds are on ownership, search and seizure of the bag containing the alleged drugs. She demonstrated her awareness that there ought to have been a search order, a certificate of seizure and a receipt to prove those facts, but she conceded that there were none.

She however assigned reasons for the omission, that the search and seizure were an emergency because the authorities had no prior knowledge that anyone suspected to be carrying drugs would be turning up at the airport. The learned Senior State Attorney sought to rely on section 42 of the CPA which provides for emergency searches as it was the case here. She also cited the case of **Merceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (unreported) and argued that in an emergency search, documentation may be dispensed with and proof may come from oral evidence. Thus, she submitted that PW5, PW6 and PW7 provide that oral testimony.

Further, the learned Senior State Attorney distinguished the case of **Paulo Maduka** (supra) because in that case the items under consideration were currencies that could easily change hands. Similarly, she distinguished **Alberto Mendez** (supra) submitting that in that case the arresting officers had prior knowledge of there being suspected drugs.

Next, the learned Senior State Attorney submitted on the alleged contradictions, placing them in compartments. First, regarding the colour of the bag, she pointed out that PW5 and PW7 were consistent that it was black and that only PW6 first referred to it as white but later

corrected his statement and said it was black. Thus Ms. Leopold played down the complaint regarding the colour of the bag as being very minor, if any. Secondly on the contents of the bag, Ms. Leopold conceded that the prosecution witnesses did not provide identical list of the items that were in that bag. She however considered that as being natural, given the lapse of time. Again, she submitted that there are no contradictions as to the number of the bags as PW5, PW6 and PW7 all said it was one bag. Lastly, she made the same submission in relation to the testimonies of PW2 and PW3 on the packaging of the alleged drugs. She conceded that one witness refers to the wrapping by using a khaki paper while the other does not make reference to that type of paper. Then she submitted that two witnesses cannot be expected to tell the story in exactly the same way. She referred us to the case of **Deus Josia Kilala @ Deo v. Republic**, Criminal Appeal No. 196 of 2018 (unreported).

The foregoing submissions are relevant in our consideration of the first three areas. We begin by appreciating the settled position of the law that, depending on the circumstances of each case, documentation is hitherto not the only way of proving seizure of a suspected item and its chain of custody. [See **Merceline Koivogui** (supra), **Kadiria Said**

Kimaro v. Republic, Criminal Appeal No. 301 of 2017 (unreported) and a score others]. It is also our finding that the learned trial judge's conclusion that the search and seizure was not contemplated by PW5, PW6 and PW7, was consistent with the evidence. We wish to add that in his submissions on this, the appellant has not criticized this finding. All the appellant is arguing is that being experienced officials permanently stationed at JNIA, PW5 PW6 and PW7 ought to have the necessary documents with them all the time for any unexpected use. In our view, this argument is neither here nor there. For one, it supports the fact that the search and seizure was an emergency one. For another, the fact that the three security officials did not have the necessary documents handy, does not render the search and seizure anyhow not an emergency one. From the above discussion, it is our conclusion that the search was an emergency.

Next, we shall address whether PW5, PW6 and PW7 are reliable witnesses. The learned trial judge inspired by the case of **Commonwealth v. Webster** 1850 Vol. 50 Mas 255 posed the question whether the prosecution witnesses were reliable. In the end he believed the story of PW5, PW6 and PW7. This is the finding the appellant

complains under the third area and wants us to find faulty based on the contradictions he attempted to point out.

In our re-evaluation of the evidence of PW5, PW6 and PW7 with the view of determining whether or not they are reliable, we are not oblivious to the fact of life that two or more people who witness an event, may not later tell it in exactly the same way. This fact of life has developed into a legal principle and it is considered to be a sign that the witness did not rehearse the story [See **Yusuph Sayi & 2 Others v. Republic**, Criminal Appeal No. 589/2014 (unreported)]. Given a mature consideration, the so-called contradictions on colour and number of the bag(s), as well as on its contents, are but delicate details that do not affect the epicenter of the case.

There was mention of a white bag by one witness who however corrected it a short while later. The alleged contradiction regarding the number of bags is just tongue twisting, but no witness referred to more than one bag. We have no basis for faulting the conclusion of the learned trial judge that PW5, PW6 and PW7 are reliable witnesses.

The same reasoning applies to PW2 and PW3. They both testified to witnessing the wrapping of the samples of the alleged drugs but the appellant moves us to hold that there was a contradiction in their

testimonies because one witness did not make reference to the colour of the wrapping material. These in our view are niceties again which cannot blur the fact that the samples were wrapped by PW2 in the presence of PW3, an independent witness.

There is one major yawning gap in the testimonies of prosecution witnesses. This is that it is not known who labeled the packets "A" "B" "C" "D". This aspect could be double edged, in our view. On the one hand it points at PW2, PW5, PW6, PW7 and PW8 as candid witnesses because each denied being the one who labeled the packets. If they were disposed to tell a lie, there was no better instance than this. On the other hand, the prosecution owes us an explanation. We shall come to this later.

We turn to other findings that were made by the learned trial judge. On the evidence of PW6 he concluded that the bag belonged to the appellant because he showed up to identify it and that PW7 was just around there and saw what transpired. On the evidence of PW6 and PW7 he concluded that the four packets were retrieved from the appellant's bag. He dismissed as remote, the appellant's defence that the bag that was tendered in evidence was different from the one that

was seized from him. We shall make our finding on this complaint a short while later.

Before us, the appellant's trump card is that no witness testified to seeing him place the suspected bag on the screening machine and that PW5, PW6 and PW7 were unreliable. Since we agree with learned trial judge that PW5, PW6 and PW7 are entitled to credence, we also agree with his finding that the bag belonged to the appellant because he showed up to PW6 to identify it. So, irrespective of the fact that nobody saw the appellant place the bag on the machine, his own conduct confirmed him as its owner. PW7 stated that the appellant was present, that is why he was asked to open the bag. In addition, when the appellant was cross examined by Ms. Kitaly during the trial, he stated: -

> *"I placed my bag in the scanner. I went to collect the bag that is when a police came to collect the bag and questioned me".*

In our conclusion therefore, ownership of the bag, the search and seizure of that bag, were proved by PW5, PW6 and PW7, the witnesses we have found to be reliable, and also by the appellant's own conduct. Therefore, the first and third areas of complaint have no merit, we dismiss them.

We now turn to the initial handling of the suspected packets subsequent to the seizure. PW7 who was the police officer in charge of the station at JNIA first placed the appellant under arrest and took him and the bag with the four packets to the station. She kept the appellant under custody and locked the four parkets in her office cabinet. Then, she called one Mr. Nzowa the Head of the Anti-Drug Unit (ADU) to relay to him the information of what had transpired. Mr. Nzowa immediately dispatched PW8 to JNIA.

At JNIA, PW7 handed over the appellant and the bag containing the suspected four parcels to PW8 who conveyed them to ADU Head office, having opened an investigation file No. JNIA/IR/206/2012. There at ADU Head office, PW8 handed over the suspected exhibits to PW2, the exhibit keeper. This was done in the presence of the appellant. PW2's testimony is that she entered the exhibit concerning Case No. JNIA/IR/206/2012 into the exhibit register and similarly marked the box with that case number. She then kept the exhibits in the exhibit room.

Incidentally, when PW8 interrogated the appellant on 12th August, 2012, he disclosed to him a clue leading to another suspect known as Emmanuel as the one who had allegedly supplied to him the drugs. The authorities pursued that lead to no success. PW2 testified that because

of engaging herself in hunting down the said Emmanuel, she did not pack the exhibits until on 14th August, 2012 when she did so in the presence of the appellant and an independent witness known as Zainab Maulana, (PW3). There is a slight difference in the narrations of PW2 and PW3 as regards the manner of packaging the exhibits, but we have resolved this complaint when dealing with the third area of complaint. We reiterate what we stated in **Yusuph Sayi & Others** (supra), that: -

> *"As we held in **Masanja Mazambi v. Republic** [1991] T.L.R. 200, such minor variations are, if anything, a healthy sign that the witnesses had not rehearsed the evidence before testifying."*

Later, PW2 and one D/Sgt Wamba took the samples to the office of CGC and handed them over to one Ernes Lujuo Isaka a chemist who marked them with Lab No. 570/2012. Upon initial testing, the chemist gave PW2 his initial report that the substance she had handed over weighed 3933.44 grams. On 26th September, 2012 PW2 received a confirmatory report.

We pause here to address the question of the initial handling of the exhibits and their chain of custody, a complaint falling under the second area. The appellant's submissions on the issue of chain of custody largely rested on the labelling and the holding in the case of

Alberto Mendez (supra). We shall reproduce the relevant paragraph of that decision which the appellant also relied on: -

> *"In resolving the issue of chain of custody, we wish to point out that each case will depend on the prevailing circumstances. We are aware that there are circumstances where the evidence of witnesses is sufficient to prove the chain of custody without any paper trial. However, the circumstances prevailing in this case and taking into consideration that most of the witnesses who handled the movement of exhibit P1 were police officers, we are constrained to agree with Mr. Mtobesya that they were duty bound to adhere to the procedure laid down in P.G.O No. 229. We strongly hold the view that it was proper to have documentation of the movement of exhibit P1 from the time of "SEIZURE" until when it landed in the hands of the Chief Government Chemist until finally it was received as exhibit in court".*

The learned Senior State Attorney has no qualm with that position but maintains that in **Alberto Mendez**, (supra) the arresting officers had prior knowledge of the existence of drugs, unlike this case.

For us, the above holding represents the contemporary view of proof of chain of custody by oral evidence in deserving cases. The same has been said in **Kadiria Kimaro** (supra), **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 and **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (both unreported) all cited in **Deus Josias Kilala @ Deo** (supra) which Ms. Leopold referred us to.

We have already concluded in the preceding pages that this was an emergency search, which rendered compliance with section 38 (3) of the CPA impossible and thus qualified it for oral evidence in place of documentary evidence. The issue for our immediate determination therefore is whether the oral evidence adduced by the prosecution sufficiently proved an unbroken chain of custody.

It begins with PW7 who took the appellant and the suspected items from the check - in lounge to her office where she locked in the appellant and kept the exhibits in the office cabinet. Then PW8's arrival from the ADU Head office. PW7 handed over the appellant and the exhibits to PW8 who conveyed them to ADU Head office after opening a case file. At ADU Head office, PW8 handed over the exhibits to PW2 who recorded them in the register and kept them. On the other hand,

PW8 interrogated the appellant in the course of which he implicated one Emmanuel said to be masquerading as a preacher whereas he was an accomplice to the drug scams. This fact was also mentioned by PW2 in her testimony and that it temporarily diverted their attention to that man known as Emmanuel, until they realized that they were not going to get him.

The High Court concluded that: *"Credible oral evidence is just as good, to establish chain of custody"* and cited the case of **Nassoro Said Kimilu & Another v. Republic**, Criminal Appeal No. 111 of 2015 (unreported).

We have considered the evidence of PW7, PW8 as well as that of PW2 and PW3 and we entertain no doubt that they provided an impeccable oral chronology of events and chain of custody of the suspected packets from the JNIA up to the ADU Head office and later to the office of the CGC. The appellant's complaint, which we promised to resolve, that the bag tendered in court as exhibit P6 was not the same as the one seized from him, is both surprising and misconceived. First of all, there was no objection to its admissibility and secondly, there would be no motive to change the bag which is of less significance compared

to the four suspected packets. We therefore agree with the conclusion reached by the learned trial judge and dismiss this complaint.

Before we wrap up this part, we revert to the issue of labeling which we had left uncleared. We had earlier appreciated that there is a yawning gap in that respect as no witness was associated with the labeling. At this stage, ours is a question whether in view of the oral evidence above referred to, absence of evidence of the person who labeled the exhibits is a dent that tips the scales in favour of the appellant. In our view it does not, although it casts a shadow of doubt. We are not losing sight of the fact that:

> *"Doubt about the guilt of an accused person can count only if such doubt is reasonable. The circumstances must also be looked at and considered in their totality".*

[See **Chandrakant Joshubhai Patel v. Republic,** Criminal Appeal No 13 of 1998 (unreported).

When the circumstances of this case are looked at in their totality there is no doubt that the packets seized from the appellant at JNIA are the same that were packed by PW2 and PW3 in his presence and later taken to the office of the CGC. The initial and confirmatory report was

that the packets contained cocaine hydrochloride weighing 3932.44 grams.

This being a first appeal we have also considered the appellant's conduct at ADU Head office as testified to by PW2 and PW3. It is that, he suggested to those officials that he was in that league with a man known as Emmanuel, a disclosure that sent the police combing the city of Dar es Salaam looking for him. In his defence, the appellant never referred to this aspect at all either in denial or confirmation. We take it to be a fact that the appellant gave the police that clue, and in our view, this conduct does not speak very well of him.

We shall conclude the second area of complaint, that is, the issue of chain of custody, after considering the evidence of the Chemist who tested the exhibits delivered by PW2 and D/Sgt Wamba. There was no doubt that at the time of the trial in 2019, this chemist Ernest Lujuo Isaka had passed on. According to Daniel Zakaria Matata (PW4) who in 2012 was the Acting Chief Government Chemist, before his death, Mr. Isaka had conducted all standard tests of the exhibits and prepared a draft report. PW4 verified the report by gauging Quality Management system which tracks the sample from the reception to the admission at the laboratory and, Standard Operating Procedures (SOP) which involve

the actual testing. PW4 got satisfied with both and vouched Mr. Isaka's work.

In addition to PW4's testimony, the prosecution tendered Mr. Isaka's statement and it was admitted without any objection. On this evidence we are satisfied that the four packets that were seized from the appellant at JNIA, are the same that were handed to PW2 and later to the office of CGC. And that they are the same Mr. Isaka tested as verified later by PW4.

On all the foregoing discussion on the oral evidence of chain of custody we conclude without hesitation that it was unbroken. We thus dismiss the second area of complaint.

We move now to the fourth area of complaint, challenging admissibility of exhibits P5, P6 and P7. To start with, exhibit P7 was admitted without objection from the appellant's counsel so the complaint regarding its admissibility can only be a misconception. As for exhibits P5 and P6, the criticism is pegged on the alleged contradictions which we have earlier resolved. These are on the colour and number of the bags, the contents and the labeling. Thus, the fourth area of complaint rests on a vacuum, hence dismissed.

The fifth area of complaint that the defence case was not considered shall be addressed simultaneously with the sixth area of complaint that the prosecution's case was not proved beyond reasonable doubt. With respect, these two complaints are a wild shot, in our view. What defence was there for the learned trial judge to consider, the appellant's own admission that he was arrested after he claimed the suspected bag? For it is clear to us that the learned trial judge considered the defence and rejected it having found the prosecution case solid. We shall let the record tell what the learned judge said:

> *"In conclusion, I am satisfied that the drugs were recovered in the trunk as the witnesses for the prosecution, that is, PW5 PW6 as well as PW7 testified. I am also satisfied that the trunk and the drugs as well as the other contents of the trunk were handed over to the police and were ultimately tendered in court. I am not persuaded by the explanation by the accused person of the police having restored the trunk to him....."*

In view of that clear pronouncement, which we agree with, these two areas of complaint have no merit, and they stand dismissed.

Lastly is the propriety of the sentence. The learned judge sentenced the appellant to life imprisonment as being the mandatory

sentence in terms of section 16 of the Act as amended by Act No. 6 of 2012. As that is the law, our hands are tied, so we dismiss the seventh ground of complaint for lacking merit.

Finally, for the reasons we have discussed, this appeal against the conviction and sentence, stands dismissed.

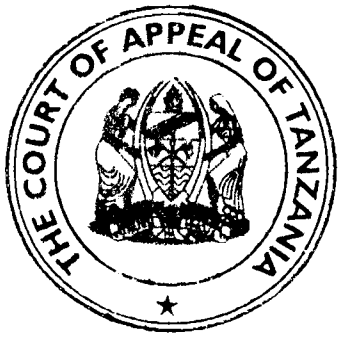
DATED at **DAR ES SALAAM** this 10th day of August, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of August, 2022 in the presence of the appellant in person and Ms. Edith Mauya, 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