IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 68 OF 2019

WALLENSTEIN ALVARES SANTILLAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Korosso, J.)

Dated the 19th day of February, 2019
in
Economic Case No. 01 of 2018

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JUDGMENT OF THE COURT

13th July, 2021 & 22nd August, 2022

WAMBALI, JA.:

The appellant, Wallenstein Alvares Santillian, a citizen of Peru arrived at Julius Nyerere International Airport (JNIA) in Dar es Salaam Tanzania on 16th November, 2017 from Brazil via Dubai aboard Emirates Airline Flight No. EK 725. On that particular date, as the police seemed to have some information from an informer on his expected arrival, after the appellant disembarked from the plane, completed immigration and arrival formalities

at the JNIA, took his luggage and proceeded to the exit gate, Inspector Hassan Rashid Mawasika who testified at the trial as PW5, stopped him, introduced himself as a police officer and put him under arrest. However, as there was communication barrier between PW5 and the appellant who spoke Spanish language, PW5 who had tried to communicate with him in English and sign language could not inform him the next step after the arrest. Few minutes later, PW5 and other police officers, including Boniface Mayala (PW10) managed to get an interpreter, Chawa Pembe Kigumu (PW8), a taxi driver at the airport who was fluent in Spanish language. Through PW8, PW5 told the appellant that they wanted to search him and the bags which he had in his possession. It is further revealed that after searching the appellant and his luggage, the purple and pink colored bags were found with 15 and 16 packets respectively suspected to contain narcotic drugs. During the said search, police officers also seized from the appellant; one Peruvian Passport, boarding pass for Emirates Airline, electronic ticket, two luggage tags, Visa payment receipt, cash money (Riaz 45, Dinar 10 and USD 626), mobile phone make ZTC silver in colour, Scotia Bank card, yellow fever vaccination card and Peruvian National Identity Card. Following the seizure, PW5 prepared a seizure certificate (exhibit P5) which he signed followed by the appellant, PW8, PW10 and one Calistus Gahava. As PW5 could not

manage to find the exhibit keeper SP Neema Mwakagenda (PW2) at the Anti-Drugs Unit (ADU) offices at Kurasini on that particular date, he stored the 31 packets seized from the appellant in a cabinet at JNIA's ADU office.

On 17th November, 2017, the 31 packets were handed over to PW2 who, after supervising the packing, labelling and sealing done by Inspector Idrisa Shukuru Musoke (PW3) in the presence of the appellant, PW5, Mashaka Abdi Hamadi (PW4) the independent witness, Cassiano Manuel Bakari (PW6) and PW10, she stored them in the exhibits room and registered them with Reference No. JNIA/IR/172/2017. Then on 20th November, 2017, PW2 handed 31 packets containing the alleged narcotic drugs and the two bags to PW5 and asked him to transmit them to the Government Chemist Laboratory Agency (GCLA) for analysis. At the GCLA the said items were received by Theodory Erasto Ludanha (PW1), the Government Analyst, who, after preliminary analysis, confirmed that the 31 packets contained cocaine hydrochloride. PW1 thereafter prepared a report in respect of his findings.

Following the arrest and seizure of the 31 packets, the appellant was formerly charged with trafficking in narcotic drugs contrary to section 15 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015 (the DCEA) read together with paragraph 23 of the First Schedule to, and section 57 (1) of

the Economic and Organized Crime Control Act [Cap. 200 R.E 2002] (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

The particulars in the information placed at the trial court alleged that on 16th November, 2017 at JNIA within Ilala District in Dar es Salaam Region, the appellant trafficked in narcotic drugs namely cocaine hydrochloride weighing 1420.78 grams. The appellant pleaded not guilty to the allegations, hence a full trial was held. The prosecution relied on ten witnesses and twelve exhibits.

In his defence, though the appellant admitted to have arrived at JNIA in Dar es Salaam on 16th November, 2017 at around 14:45 aboard Emirates Airway from Brazil, he categorically disassociated himself from the allegation that he trafficked in 31 packets of narcotic drugs. He contended that he had never involved in narcotic drugs business and that the two bags that contained the 31 packets did not belong to him.

Nonetheless, at the climax of the trial, after the trial court considered the evidence for both sides, it was satisfied that the prosecution case was proved to the hilt. Hence, the appellant was found guilty, convicted as charged and sentenced to twenty years imprisonment.

Aggrieved, the appellant has approached the Court contesting both the conviction and sentence. It is noteworthy that initially, the appellant lodged a memorandum of appeal comprising 22 grounds of appeal followed by written submissions in support of the appeal. However, before the hearing of the appeal, Mr. Nehemiah Geofrey Nkoko, learned advocate who was assigned to appear and represent the appellant lodged a supplementary memorandum of appeal in terms of Rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 comprising six grounds of appeal in substitution of the former memorandum of appeal after his prayer was granted by the Court on 28th April, 2021. Before the commencement of the hearing, he also prayed to add one ground of appeal, and we so granted the requisite leave as there was no objection from the respondent Republic's counsel. The grounds of appeal therefore portray the following seven complaints:

> *"1. THAT the learned trial Judge wrongly convicted and sentenced the appellant based on defective information.*
>
> *2. THAT the learned trial Judge grossly misdirected herself in fact and in law in not finding that there was non-disclosure of the offence of Trafficking in Narcotic Drugs to the Appellant contrary to section 23 (1) of the Criminal Procedure Act [Cap 20 R.E.*

2002] and section 48 (2) (a) (ii) of the Drug Control and Enforcement Act, Act No. 5 of 2015.

3. THAT, the learned trial Judge grossly misdirected herself in fact and in law for failure to analyze properly the evidence adduced having regard to the circumstances of the case and contradictions in the evidence adduced by the prosecution on the arrest, search and seizure of the appellant before concluding that the appellant when arrested at Julius Nyerere International Airport was in possession of exhibits P.1 (a) and P.1 (b) respectively.

4. THAT, the learned trial Judge grossly misdirected herself in fact and in law for failure to consider the principles which have to be taken into account in respect of chain of custody and preservation of exhibits in regard to exhibits P.1 (a) and P.1 (b), which by the testimony of PW5 the chain of custody was compromised as all witnesses brought by prosecution failed to identify in court the contents of exhibits P.1 (a) and P.1 (b) i.e. powder substance.

5. THAT, the learned trial Judge misdirected herself in fact and in law in not finding that there were contradictions in the evidence of PW1 in regard to the chain of custody and regarding exhibit P.3

(Government Chemist Report) which was incomplete and was not in respect of Exhibit P.1 (a) and P.1 (b).

6. THAT, the learned trial Judge grossly misdirected herself in law and in fact in failing to properly analyze the evidence given by the Appellant and the Respondent and shifted the burden of proof to the Appellant, especially on the issue of CCTV footage and also taking into consideration that the testimony of the appellant was never challenged by the Respondent.

7. THAT, the learned trial Judge grossly misdirected herself in fact and in law in convicting the Appellant against the weight of evidence."

At the hearing of the appeal, the appellant who entered appearance in person was ably represented by Mr. Nehemiah Geofrey Nkoko, learned advocate. As the appellant was fluent in Spanish and could not understand and speak Swahili or English, the interpretation was done by Mr. Josiah Kulwa Shindika with the consent of the appellant. Apparently, it is Mr. Shindika who also offered interpretation services from Swahili to Spanish and vice versa at trial before the High Court. On the other side, the respondent Republic was duly represented by Ms. Cecilia Shelly assisted by Ms. Tully Helela, learned Senior State Attorney and State Attorney respectively.

Mr. Nkoko started by submitting on the first ground concerning the complaint that the appellant was wrongly convicted and sentenced based on an incurably defective information laid at the trial court. He elaborated that the appellant was charged under section 15(1) (b) of the DCEA instead of section 15(1)(a) of the same Act. In his submission, the citing of paragraph (b) instead of paragraph (a) of section 15(1) of the DCEA rendered the information to be incurably defective. To support his assertion, he referred the Court to its decision in **The DPP v. Mirzai Pirbakhshi @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported).

He added that though in the course of trial, the information was amended pursuant to section 276 (3) of the Criminal Procedure Act, [Cap 20 RE 2002, now R.E 2022] (the CPA), the defect was not cured. In the circumstances, Mr. Nkoko concluded that as the information was incurably defective, the entire trial was a nullity. He thus urged us to allow this ground of appeal, nullify the trial court's proceedings, quash conviction, set aside the sentence and set the appellant at liberty as a retrial will cause miscarriage of justice on his part.

In reply, Ms. Shelly stated that the information preferred against the appellant at the trial court was proper since by the time the offence was

committed, that is, on 16th November, 2017 paragraph (a) of section which was introduced by an amendment to Act No. 5 of 2015 by the Written Laws (Miscellaneous Amendments) Act No. 15 of 2017 had not come into operation. Therefore, she submitted that, since the said Act became operational on 1st December, 2017, it could not act retrospectively. Ms. Shelly concluded her submission by beseeching the Court to find the complaint in this ground baseless.

We have carefully considered the arguments by the learned counsel for the parties on the issue. We entirely agree with the learned Senior State Attorney that the information which was placed at the trial court properly indicated that the appellant was charged under section 15 (1)(b) of the DCEA. The appellant could not thus have been charged under paragraph (a) of section 15 (1) which was introduced by section 8 of the Written Laws (Miscellaneous Amendments) Act No. 15 of 2017. The said amendment which came into operation on 1st December, 2017 concerned the substantive provisions of law and not procedural law. The amendment could not therefore apply to an offence against the appellant which was alleged to have been committed on 16th November, 2017 before Act No. 15 of 2017 came into operation. In the event, as correctly submitted by Ms. Shelly, the amendment could not apply retrospectively in line with the Court's previous

decisions, including; **The DPP v. Jackson Sifael Mtares and Three Others**, Criminal Application No. 2 of 2018 (unreported).

Indeed, we are satisfied that the particulars in the information which supported the provision of section 15(1) (b) of the DCEA sufficiently informed the appellant the offence which he stood charged and called upon to plea. For avoidance of doubt, before the amendment of Act No. 5 of 2015 by Act No. 11 of 2017, paragraph (a) and (b) of section 15 (1) provided as follows:

> *"15(1) Any person who-*
>
> *(a) is found in possession or does an act or omits to do an act or any other thing in respect of narcotic drugs, psychotropic substances or preparation containing any manufactured drugs;*
>
> *(b) traffics in narcotic drug or psychotropic substance, commits an offence and upon conviction shall be liable to life imprisonment; and"*

On the contrary, through the amendment effected by section 8 of Act No. 15 of 2017, paragraph (a) of section 15 (1) of the DCEA was deleted and paragraphs (b) and (c) were renumbered as paragraphs (a) and (b)

respectively. Besides, the renamed paragraph (b) was deleted and substituted to provide as follows:

> *"(b) traffics, diverts or illegally deals in any way with precursor chemicals, substances with drug related effects and substances used in the process of manufacturing of drugs; and"*

In the circumstances, considering the stipulation of the law during the arrest and arraignment of the appellant at the trial court, the appellant could not have been charged under paragraph (a) of section 15(1) as contended by Mr. Nkoko. It follows that the decision of the Court in **The DPP v. Mirzai Pirbakhshi @ Hadji and Three Others** *(supra)*, cannot apply in the circumstances of the present appeal. In the event, we find the complaint of the appellant in the first ground of appeal unfounded and hereby dismiss it.

It was contended by Mr. Nkoko in respect of the second ground of appeal that the trial of the appellant was not fair. The thrust of his contention was that the appellant was prejudiced because the provisions of sections 23(1) of the CPA and section 48(2) (a) (ii) of the DCEA were not complied with during the arrest. He argued that during the arrest, the appellant was not informed the reason for the arrest and the offence he was suspected to have committed. In this regard, he submitted that the trial which followed

was a nullity for the miscarriage of justice and that the appellant was greatly prejudiced at the trial. In his view, lack of a fair trial alone rendered the entire trial of the appellant a nullity.

Responding, the learned Senior State Attorney contested the argument and argued that though there was communication problem due to language barrier between the appellant and PW5 during the arrest, few minutes later after the interpreter (PW8) was found, the appellant was informed of the offence he was suspected to have committed and that the Police Officers (PW5 and others) wanted to search him. She therefore submitted that there was no miscarriage of justice occasioned to the appellant to justify nullification of the entire trial court's proceedings as prayed by the appellant's counsel contending that the trial was unfair.

At this juncture, we wish to state that the provisions of section 48(2)(a)(ii) of the DCEA is clear on the requirement to inform the suspect on the reason for the arrest. We therefore do not intend to deal with this section simultaneously with section 23(1) of the CPA which is of the same effect.

According to the provisions of section 48(2) (a) (ii) of the DCEA, it is plain that upon arrest of the suspect, the arresting officer of the authority or

any other enforcement organs, like the police, must inform the suspect of the ground or reason for arrest and the substance of the suspicion he is alleged to have committed.

Having closely scrutinized the record of appeal, we agree with the reasoning and finding of the trial judge on what transpired during the arrest and interrogation which indicates that the appellant was duly informed of the reason for his arrest and the nature of the offence he was alleged to have committed by the police (PW5). Particularly, the trial judge stated as follows:

> *"Suffice to say, this provision provides for the person implementing this, to determine where it is reasonable or impracticable to follow all the arrest procedures outline in the Act. PW5 evidence was that he only found out that the accused person did not understand Swahili or English after stopping him and introducing himself and requesting the accused person to go with them for questioning. But PW5 stated that, despite this he managed to communicate with him a bit in English and sign language, leading the accused person to follow him in the office at JNIA. Bearing in mind the situation in the absence of an interpreter on hand at the time of stopping the accused person before he left to go outside, one*

cannot condemn the arresting officers for not informing the accused person of reasons for being taken for questioning at that particular time. PW5 and PW6 stated that, on arrival at the office, they immediately sent officers to find someone who could assist in translation hence, PW8 was found and brought to the office. There is no doubt that, what was done was the quickest and most practicable thing to do under the circumstances. It is in evidence from PW5 that after the arrival of PW8, through him, the accused person was informed why he was under restraint, that he was suspected of trafficking narcotic drugs. It is important to understand, that at the time of arrest, the important thing is for the accused to understand the substance of the offence he is suspected to have committed. From the evidence in court, even provided by the accused himself, there is no doubt he was made aware of this, hence his signing of exhibit P5. Therefore, we find no evidence of unlawful arrest and that the prosecution have proved they did all the needful in the circumstances pertaining at the time of arrest of the accused person."

Admittedly, the evidence on record does not show that the appellant was specifically informed of the offence he was suspected to have committed

before he was searched after arrest. However, according to the same record of appeal, PW5 started by touching the appellant and confining him soon after his arrival at JNIA on his way to the exit gate. PW5 therefore fully complied with the provisions of section 48(2)(i) of the DCEA.

Despite of the language barrier, it is clear in the record that PW5, PW6 and PW10 made effort and obtained an interpreter (PW8) after few minutes. Immediately after his arrival, PW8 is recorded to have informed the appellant that the Police Officers wanted to search him and he agreed as clearly indicated at pages 233-236 of the record of appeal. It is also on record that after the appellant was searched, his two bags were found with 15 and 16 packets respectively, being a total 31 packages whose contents were suspected to be narcotic drugs. The appellant then signed the seizure certificate (exhibit P5) showing that he was found in possession of the said 31 packets retrieved from the two bags which were also admitted as exhibits P9 (a) and P9 (b). Exhibit P5 also indicates other personal belongings stated above found in possession of the appellant during the search. Though the appellant disputed being the owner of the said packets suspected to contain narcotic drugs, he did not claim that he did not understand what he was told by PW8 concerning the search and what he was found with before he signed exhibit P5.

Therefore, as the appellant signed exhibit P5 which was later tendered and admitted in evidence, it can be concluded, as stated by the trial judge that he was made aware of the suspicion which the police had and ultimately led to the search.

We are alive to the argument of Mr. Nkoko that PW5 could have found an interpreter before the arrest as he was duly aware of the arrival of the appellant at JNIA on that particular date. To this argument, we are of the opinion that much as PW5 could have been aware of the appellant's arrival, there is no indication in the record that he knew that the appellant was only fluent in Spanish to enable him find an interpreter for that language. The evidence on record does not show that the informer told PW5 the language the appellant was fluent. It is in this regard that according to the record of appeal, PW5 tried to communicate with the appellant in English and sign language until he discovered that he only spoke Spanish. Thus, it was not possible until he sent another police officer, PW10 to find PW8, a taxi driver at JNIA who was fluent in Spanish language. There is also no indication that PW5 knew PW8 before the incident. Indeed, according to the evidence on record, PW5 was only informed of the name of the appellant and how he looked like to facilitate the arrest.

In the circumstances, like the trial judge, considering the efforts made by PW5 to ensure that he communicated with the appellant immediately after his arrest, we hold that lack of specific indication in the evidence on record that he was informed of the reason for his arrest cannot be held to have prejudiced him as he was legally arrested and made aware of the suspicion for being held in terms section 48(2) (a) (i) and (ii) of the DCEA. It was on that regard that the appellant fully participated in the search and packing of the exhibits before he was arraigned at the inquiry court. In the event, we dismiss the second ground of appeal.

The appellant's complaint in the third ground of appeal is that the trial judge failed to analyse properly the evidence of the prosecution amid contradictions in the evidence of PW5 and PW10 concerning the arrest, search of the appellant and seizure of suspected narcotic drugs before she concluded that the appellant was arrested at JNIA in possession of exhibits P1(a) and P1(b). In essence, the basis of the appellant's counsel submission in this ground is that PW5 and PW10, the witnesses who were at JNIA did not show that they had in possession of the search warrant which mandated them to search the appellant. Mr. Nkoko argued therefore that since the search was not an emergency as PW5 was aware that the appellant would arrive on that date, the search which was conducted was contrary to the

provisions of section 38(3) of the CPA and section 32(4) and (5) of the DCEA which require the presence of a search warrant.

The learned counsel added that even after the search, PW5 did not issue any receipt of what was found in possession of the appellant on that date contrary to the requirement of the law. To support his submission, he made reference to the decision of the Court in **Shabani Said Kindamba v. Republic,** Criminal Appeal No. 390 of 2019 (unreported). On the other hand, Mr. Nkoko submitted that there was apparent contradiction on who really arrested the appellant as while PW5 contended that he arrested him while accompanied by PW10 and Interpol Officer, PW10 testified that it was the Interpol Officer who arrested the appellant. In his view, the contradiction was material and eroded the prosecution case. In the end, Mr. Nkoko implored the Court to allow the third ground of appeal.

Re-joining, Ms. Shelly conceded that PW5 did not possess the search warrant or issue a receipt after searching and finding the appellant with 31 packets suspected to contain narcotic drugs. However, she maintained that though PW5 had some information on the arrival of the appellant at the JNIA on the particular date, it was difficult to know what had to be searched as at that particular time, PW5 was not sure whether the search would be

conducted on the appellant's body or luggage. She contended further that, it was until PW5 saw the appellant with the bags and soon after the arrest that he decided to search the appellant personally and those bags which were later found to have 31 packets containing substances suspected to be narcotic drugs. She argued further that despite the absence of a search warrant after the search the appellant signed the seizure certificate (exhibit P5) which indicated that he was found in possession of 31 packets suspected to contain narcotic drugs. Besides, she stated, the appellant did not object to the admission of exhibit P5 which he duly signed and that during cross examination, he did not ask any question concerning the issue of receipt of seizure. She argued further that, the absence of the search warrant and the receipt of seizure did not prejudice the trial of the appellant.

With regards to the contradiction on the arrest of the appellant, Ms. Shelly submitted that there was none as the record is clear that the appellant was arrested by PW5 in the presence of PW6 and PW10. Thus, the absence or presence of an Interpol officer during the arrest cannot supress the fact that the appellant was duly arrested on arrival at JNIA by PW5 and PW10 and ultimately searched in the presence of those witnesses. In the circumstances, she prayed for the dismissal of the third ground of appeal.

It is not doubted that during the arrest, PW5 did not have a search warrant before he searched the appellant. We have thoroughly reviewed the evidence on record in respect of this matter. We are satisfied that the circumstances leading to the arrest and search of the appellant could not have necessitated the presence of the search warrant. We are of the settled opinion that PW5 being a police officer properly conducted an emergence search as upon the arrival of the appellant despite the prior information which did not sufficiently disclose all matters pertaining to the appellant, he suspected that the appellant might have carried something related to the commission of an offence. It was in that regard that PW5 first stopped the appellant who carried the bags and directed him to the ADU office at JNIA where he was searched after the interpreter (PW8) was found. PW5 therefore properly acted under section 42(1)(a) and (2) of the CPA by stopping the appellant, searching him and his luggage and seized what was suspected to be in connection of the offence related to trafficking in narcotic drugs.

More importantly, according to the evidence of PW8, the appellant was notified that those police officers, including PW5, wanted to search him and he agreed. Besides, after the search, the appellant signed exhibit P5 acknowledging that he was found in possession of 31 packets containing

substances suspected to be narcotic drugs and other personal properties. Moreover, as submitted by the learned Senior State Attorney, exhibit P5 was not objected to by the appellant before it was admitted at the trial as he duly signed it to acknowledge what transpired at the JNIA. In the result, having reviewed the entire evidence on record, we hold that in the circumstances of the case at hand search was conducted in an emergence situation and therefore the provisions of sections 38(1) of the CPA and 32(4) of Act No. 5 of 2015 the DCEA would not apply.

We also find that section 38(3) of the CPA which must be read together with other subsections is not applicable in the circumstances of the case at hand. This is because, after PW5 searched the appellant and seized the 31 packets suspected to contain narcotic drugs, he caused him and other witnesses, including PW8 and PW10 to sign the seizure certificate (exhibit P5) which clearly indicated that the appellant was found in possession of 31 packets suspected to contain narcotic drugs', the subject of the allegations. Besides, there was no objection from the appellant when exhibit P5 was tendered before admission.

We equally see no prejudice which was caused to the appellant for the failure of PW5 to issue a seizure receipt as exhibit P5 sufficiently indicated

what was found in possession of the appellant and that he signed it acknowledging to have witnessed the search in which the 31 packets were retrieved from the two bags. In the premises, we are of the opinion that the decision of this Court in **Shabani Said Kindamba** (*supra*) relied by Mr. Nkoko to support his submission cannot apply in the circumstances of this case.

As the circumstances of this case fell on the emergency search, we wish to reiterate what we stated in **Maluqus Chiboni @ Silvester Chiboni and John Simon v. The Republic**, Criminal Appeal No. 8 of 2011 (unreported) thus:

> *"We are aware of the law governing search warrants and seizure (Part II A (d) of the CPA, Cap 20 R.E 2002, particularly section 38 and 42, section 38 and 40 require generally that a search warrant be issued to a police officer or other person so authorised, before such officer or person executes the search. However, under exceptional circumstances, a police officer may conduct search and seizure without warrant. Such circumstances are listed under section 41 and 42 of the CPA Cap 20. Relevant to this case are the provisions of section 42 (1)(b) of Cap 20.*

See also ***Moses Mwakasindile v. The Republic****, Criminal Appeal No. 15 of 2017 and* ***Slahi Maulid Jumanne v. The Republic****, Criminal Appeal No. 292 of 2016 (both unreported)."*

It is further noted that during the same emergency search the appellant's other possessions taken at the scene were tendered at the trial and admitted as exhibits P6, P7, P8(a), P8(b), P8(c), P9(a), P9(b), P10(a), P10(b), P11(a), P11(b), P11(c) and P12. The said exhibits formed part of the contents of the items listed in exhibit P5 which was not contested by the appellant at the trial. Besides, the search conducted by PW5 was also witnessed by PW6, PW7 and PW10 who the appellant did not contest their testimonies.

On the other hand, we do not see any material contradiction between PW5 and PW10 on the evidence as to who really arrested the appellant as contended by Mr. Nkoko. The evidence on record indicates without doubt that it was PW5 who led the convoy of police officers who arrested the appellant soon after he disembarked from the plane and heading to the exist gate. The evidence is also supported by PW7 and PW10. Though the evidence of PW10 was to the effect that the appellant was picked by Interpol police officers for questioning after the arrest, he also in the course of his

evidence, acknowledged that it was PW5 who did the arrest and initial questioning after arrest before the arrival of the interpreter (PW8) and proceeded later with the search. To this end, we hold that the noted minor contradiction between PW5 and PW10 on the person who arrested the appellant did not supress or dent the overall material evidence on record that the appellant was arrested by PW5 in the presence of PW7 and PW10.

Dealing with the issue of contradiction and inconsistencies, in **Trazias Evarista @ Deusdelit Aron v. The Republic**, Criminal Appeal No. 188 of 2020 (unreported), the Court reiterated the principle governing the allegations of inconsistences and contradictions in the testimonies of witnesses thus:

> *"One, the court has a duty to address the inconsistencies and try to resolve them where possible, or else the court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter, see for example* ***Mohamed Said Matula v. The Republic*** *[1995] TLR 3. Two, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of evidence is contradictory then the prosecution case will be dismantled. See for example* ***Said Ally Ismail v.***

> ***The Republic***, *Criminal Appeal No. 214 of 2008 (unreported). Three, in all trials, normal discrepancies are bound to occur in the testimony of witnesses, due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence. Minor contradiction or inconsistencies or trivial matters which do not affect the case of the prosecution should not be made a ground on which evidence can be rejected in its entirety. See for example* ***Armand Guehi v. Republic***, *Criminal Appeal No. 242 of 2010 (unreported)."*

Moreover, in **Dickson Elia Nsamba Shapwata v. The Republic**, Criminal Appeal No. 92 of 2007 (unreported), the Court relied on the extract from a book by Sarkar, **The Law of Evidence,** 10th Edition, 2007 at page 48 where it was stated that:

> *"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 normal and 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".

In **Said Ally v. The Republic**, Criminal Appeal No. 249 of 2008 (unreported), the Court stated that:

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled."

[See also **Ally Kinanda and Others v. The Republic**, Criminal Appeal No. 206 of 2007; **Samson Matiga v. The Republic**, Criminal Appeal No. 205 of 2007; **Omari Kasenga v. The Republic**, Criminal Appeal No. 84 of 2011 (all unreported)].

Having examined the evidence on record in its totality, we find that despite minor contradictions and discrepancies in the evidence of PW5 and PW10 with regard to the person who arrested the appellant, we are settled that the same are normal and not so material to dismantle the prosecution case. Consequently, we find the third ground of appeal baseless and accordingly dismiss it.

The epicentre of the appellant's complaint in the fourth ground of appeal is that the chain of custody of exhibit P1(a) and P1(b) was compromised as all prosecution's witness including PW5 who testified before the trial court failed to identify the contents of the exhibits, that is, the powder substance. In support of this ground, Mr. Nkoko strongly submitted that there is no documentary evidence to show how exhibits P1(a) and P1(b) were handled from one witness to another from the time they were seized until tendered during trial. He emphasized that PGO 229 paragraph 30 requires that every exhibit must have a distinctive mark. On the contrary, in the case at hand, he stated, though there were 31 packets, the exhibits were lumped into two parts and simply marked as A and B by PW5 after the seizure and before they were sent to the ADU office at Kurasini and later to the Government Analyst for analysis. He emphasized that the evidence of the prosecution did not show how the exhibits were handled by the witnesses before they were tendered in court as required by the law. Besides, he stated, there was no register which was tendered in court to show that the exhibits were recorded after the alleged seizure at the JNIA as required by the law. In his submission, the chronology of events from seizure to the analysis left no doubts that the handling of the exhibits by the prosecution witness created the possibility that there was tampering. He also argued

that considering the evidence by PW6 that one of the packet was torn during retrieval from the luggage pipe at the JNIA to the extent that the powder contained therein poured down, there was the need for the prosecution witnesses to identify the exhibits at the trial court to confirm that what they saw before were the same.

Mr. Nkoko contended further that Regulation 15 of the Drugs Control and Enforcement (General) Regulations 2016 (The Regulations) was not complied with by the prosecution considering the way exhibit P1(a) and P1(b) were handled from seizure to the time the same were tendered in court. In the circumstances, he pressed us to find that though oral evidence can be used to prove chain of custody, the evidence on record indicated that the absence of documentary evidence fundamentally weakened the prosecution case to entitle the court to expunge exhibits P1 (a) and P1 (b) for being improperly admitted into evidence. In his opinion, the trial judge wrongly concluded that the chain of custody was not compromised amidst the inconsistencies and discrepancies in the handling of the exhibits by the prosecution witnesses.

In her reply, Ms. Shelly argued that according to the evidence on record, though the prosecution witnesses identified the contents of exhibits

P1 (a) and P1(b) and that no documentary evidence was tendered to show the chain of custody, all of them identified the exhibit and confirmed that they were the same they saw before. She also spiritedly submitted that the oral evidence on record sufficiently demonstrated that the handling of the 31 packets made the chain of custody to remain intact from the time of seizure, transfer to ADU office, packing and analysis until they were tendered at the trial and admitted as exhibits P1 (a) and P1 (b). She maintained that there was clear connection on how the exhibits were transferred to PW2 by PW5 and later back to PW5 who transmitted to PW1. The latter who examined the contents and confirmed that the packets contained narcotic drugs known as cocaine hydrochloride and later returned to PW5 who was accompanied by PW3. Indeed, PW5 handed back the packets while intact to PW2 for custody up to the time the same were tendered in court.

Ms. Shelly argued further that considering the oral evidence on record, there is no possibility that there was tampering with the 31 packets containing narcotic drugs at any stage from seizure to the time they were tendered in court and admitted as exhibits. In her view, despite the rupture of one of the packets which occurred during the retrieval from the luggage pipes that could not have affected the contents inside, as the said packet was repacked and re-sealed and remained so until all packets were tendered

in court. She argued that the evidence on record indicated that PW1, PW2, PW3, PW4, PW6, PW7, PW8, PW9 and PW10 categorically identified the packets in court when they testified as the ones they saw before the trial. All witnesses, she submitted, identified the packets as they saw at the appropriate time and opportunity and that could not have identified the contents which was not exposed to them at the time of seizure, storage, packing and transfer to the Government Analyst for analysis. In the end, she supported the trial judge's finding that the chain of custody was not broken and that there was no inconsistencies or discrepancies in the evidence of prosecution witnesses regarding the handling of the exhibits.

It is settled that the chain of custody must be clearly indicated to establish that the exhibits were not tampered with (see **Abuhi Omar Abdallah and Three Others v. The Republic**, Criminal Appeal No. 28 of 2010 (unreported). It is also settled that it is important to have the chronological documentation and/ or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence to guarantee that the said evidence relates to the alleged crime [see **Paulo Maduka and 4 Others v. The Republic**, Criminal Appeal No. 110 of 2007 (unreported)].

On the other hand, where there is no chronological documentation or paper trail of the movement of exhibits, oral evidence on record can suffice depending on the circumstances, to prove the unbroken chain of custody. For this stance, see for instance the decisions of the Court in **Charo Said Kimilu and Another**, Criminal Appeal No. 111 of 2015 (unreported) and **Abas Kondo Gede v. The Republic**, Criminal Appeal No. 72 of 2017 (unreported), among other decisions.

Indeed, in **Chukwudi Denis Okechukwu and Three Others v. The Republic,** Criminal Appeal No. 507 of 2015 (unreported), the Court stated that the rationale for satisfactorily establishing a chain of custody from the time of the seizure of the exhibit to the time it is tendered in court at the trial as an exhibit include: -

> *"One, to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with. Two, to establish that, the alleged evidence is in fact related to the alleged crime in which it is being tendered, rather than for instance having been planted fraudulently to make someone guilty. See:* ***Paulo Maduka and 4 Others v. The Republic****, Criminal Appeal No. 110 of 2007,* ***Surahibu Ally Bakari v. The Republic****, Criminal Appeal No. 309 of 2010 and* ***Paschal Maganga and***

***Another v. The Republic**, Criminal Appeal No. 268 of 2016 (all unreported)."*

In the case at hand, it is not disputed that there is no chronological documentation of the handling of exhibits P1 (a) and P1(b) from the time of seizure to tendering in court. However, having critically evaluated the evidence on record, we entirely agree with the learned Senior State Attorney that there is sufficient direct oral evidence to show that the handling of the respective exhibits demonstrate that the chain of custody was not broken. It is noted that the importance of oral evidence finds support from the provisions of section 62 (1) (a) of the Evidence Act, [Cap 6 R.E. 2022] whose value has been emphasized in several decisions of the Court. In **Charo Said Kimilu and Another v. The Republic**(supra), we quoted the decision in **Commonwealth v. Webster** 1850 Vol. 50 MAS 255 in which Show CJ stated as follows:

"The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved who if speaks the truth saw it done. The only question is whether he is entitled to belief."

In the instant appeal, we are satisfied that the evidence of the prosecution witnesses, namely; PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW10 demonstrated that what they saw and handled at the

respective period were the same they identified at the trial after they were tendered and admitted as exhibits. Considering the evidence on record as a whole, there is no indication that what the respective witnesses saw at the particular time were different from those tendered at the trial. Besides, the issue of rupture of one of the packets which was apparent even at the seizure as per the evidence of prosecution witnesses and the appellant was remedied by resealing while at JNIA before the 31 packets were sent to ADU office at Kurasini.

Indeed, the appellant who was involved at the time of seizure at JNIA and packing at ADU Kurasini office, did not suggest that what he saw at the time of seizure and packing was different from what was tendered at the trial. Besides, despite the rupture of one of the packets which exposed the contents at the time of seizure which occurred during retrieval and later resealed, the contents of other packets were not exposed at any stage except during the analysis by PW1. After the analysis, PW1 discovered that the packets contained the powder substance known as cocaine hydrochloride. It is also on record that after the analysis PW1 sealed the packets and packed them as presented and returned to PW5 who sent to PW2 for custody at ADU Office Kurasini until the moment she tendered them at the trial. As for labelling of exhibits which was done at ADU office being A

and B, we are of the view that considering the circumstances surrounding the retrieval of the packets, it was convenient for them to be grouped into two parcels of 15 and 16 packets and stored in the two envelopes as found in the pink and purple bags respectively. Though they were not distinctly marked, no prejudice was occasioned to the appellant. We are settled that in view of the evidence on record on how the packets were handled at the seizure, packing and transfer for analysis, the provisions of Regulation 15 (1) and (2) of the Regulations which concern sampling classification of drugs cannot apply in the circumstances of the case at hand.

From the foregoing, we find the fourth ground of appeal to lack merit and proceeded to dismiss it.

In the fifth ground of appeal, Mr. Nkoko forcefully argued that the report of the Government Analyst which was admitted as exhibit P3 did not comply with the direction stated under the provisions of section 48A (1) and (2) of the DCEA because the effect of the disclosed narcotic drugs was not established. Mr. Nkoko submitted that though the report was conclusive on the type of the narcotic drugs found in the packets, there was no proof that the said contents were dangerous and harmful to human being. For his part, lack of proof to that effect discredited the prosecution case and prejudiced

the appellant as the report was incomplete contrary to the requirement of the law, particularly, Form DCEA 009 stipulated in the Second Schedule to the DCEA.

In response, Ms. Helela conceded that exhibit P3 did not disclose the effect of the narcotic drugs which were found in possession of the appellant. However, she submitted that the failure to disclose the effect did not render credence to the fact that the appellant was not found in possession of 31 packets of narcotic drugs which, after analysis, were found to contain cocaine hydrochloride. Besides, she stated, the particulars in the report fully indicated that the 31 packets contained narcotic drugs which are undoubtedly dangerous to human beings who might have consumed the substance. The important thing, she argued, is that PW1 confirmed through exhibit P3 that the contents in the packets were narcotic drugs known as cocaine hydrochloride and thus no prejudice was occasioned to the appellant for the failure to disclose the effect of the drugs.

Firstly, we wish to remark that section 48A (1) and (2) of the DCEA mentioned by Mr. Nkoko in his submission in support of this ground of appeal was introduced through the amendment by Act No. 15 of 2017 which we have made reference to in determining the first ground of appeal. We

therefore reiterate our stand that as the said Act came into operation on 1st December, 2017 the provision is not applicable in the circumstances of this appeal. Secondly, according to the record of appeal it is admitted that exhibit P3 was incomplete as it did not disclose or explain the effect of the narcotic drugs found in the 31 packets to human health if consumed by a person as required under Form DCEA 009 (the Government Laboratory Analyst Report) prescribed in the Second Schedule to the DCEA as submitted by counsel for the parties. Nonetheless, the crucial issue for determination is the extent of prejudice caused to the appellant. It is not disputed that the primary role of the Government Analyst is to analyse and examine the samples retrieved from a suspect to find whether it is narcotic drugs, substance or substance used in preparation of drugs.

According to "Exhibit B" of Form DCEA 009 (the Government Laboratory Analyst Report), paragraph (d) required the Analyst to go further and show the effect of the drug or substance to human health if consumed/ applied or used anyhow. In the present case, we hold the opinion that the omission to categorically indicate the effect of the drugs to human health did not prejudice the trial of the appellant. In our view, the bottom line is that cocaine hydrochloride which was found in the 31 packets seized from the appellant is among the narcotic drug or psychotropic substance set out in

the First Schedule to the DCEA whose possession, trafficking, purchase or manufacturing was prohibited under the provisions of section 15 (1)(b) of the DCEA (now section 15 (1) (a)) under which the appellant was charged.

To this end, we hold the firm view that exhibit P3 being a laboratory analysis report is competent as its conclusion is that the contents in the packets were cocaine hydrochloride. The report met the required minimum scientific criteria and standard as there are sufficient explanation on the inferences that were needed to reach the conclusions. More importantly, it is on record that during the trial, PW1, the Government Analyst who analysed the contents and authored the report, testified in detail on what he did during the process of analysing the 31 packets before he reached the conclusion that they contained cocaine hydrochloride. It is no wonder that during the trial, the defence objection to the admission of exhibit P3 related to the issue of how PW1 came into possession of the documents and not the contents. We are indeed settled that the objection was properly overruled by the trial judge. Consequently, we hold that the omission to show the effect of the narcotic drugs did not render the entire report on the contents of what was found in possession of the appellant invalid. We accordingly dismiss the fifth ground of appeal.

Next for consideration is the sixth ground of appeal. It was the argument of the appellant's counsel that the trial judge failed to analyse the evidence of the appellant and the respondent Republic properly. He argued that in the course of composing the decision, the trial judge shifted the burden of proof to the appellant on the issue of CCTV footage while his testimony was never challenged by the respondent Republic on the matter. Mr. Nkoko submitted further that as testified by the appellant, there was a need for the prosecution to bring in the court the CCTV footage to show that the appellant was actually arrested at JNIA in possession of the bags which contained the 31 packets of narcotic drugs. In his submission, it was not the duty of the appellant to prove that the CCTV mounted at JNIA did not show that he was arrested in possession of those bags.

In a brief reply, Ms Helela submitted that since the incident of the arrest of the appellant was witnessed by eye witnesses, namely, PW5, PW6, PW7 and PW10, there was no need for the prosecution to tender the CCTV footage to support its case. To support her submission, she made reference to the decision of the Court in **Lilian Jesus Fortes v. The Republic**, Criminal Appeal No. 157 of 2018 (unreported). She maintained that the appellant's complaint was baseless because the eye witnesses confirmed that the appellant was arrested at JNIA on 16th November, 2017 in

possession of the two bags which contained the 31 packets of narcotic drugs as confirmed by exhibit P5.

Having appraised the evidence of the parties on record and the judgement of the High Court, we have noted that during the trial this matter was neither raised by the appellant nor decided by the High Court. In this regard, this not being a point of law, and as such, since it was not borne out of the trial court's proceedings and judgment, the Court cannot deal with it. Nevertheless, according to the record of appeal, it is clear that the decision of the trial court which resulted into the conviction of the appellant was purely based on the evidence of eye witnesses who witnessed the arrest of the appellant and also testified for the prosecution. There is also no doubt that the defence of the appellant on the issue of arrest was considered by the trial judge.

In view of what we have stated above, we are satisfied that trial judge thoroughly evaluated the evidence for both parties on record before she concluded that the appellant was arrested at JNIA in possession of exhibit P1(a) and P1(b). The relevant evidence is to the effect that after the appellant disembarked from the Emirates Airline, he picked the two bags and passed through scanning machine and as he was about to get out of the exit

gate at JNIA, he was stopped and arrested by PW5 in the presence of PW6, PW7 and PW10. Thereafter, he was searched by PW5 in the presence of the said witnesses and PW8 where the 31 packets of narcotic drugs were found in the two bags. There is no doubt that the two bags that were admitted as exhibits P9(a) and P9(b) belonged to the appellant as the luggage tags had his name. The luggage tags were also admitted collectively as exhibit P11(c). The appellant also admitted to have checked two bags before his departure in Brazil on 15th November, 2017 though he claimed that the same were black in colour. The claim was however dispelled by the fact that the luggage tags attached to the two bags showed his name and which he admitted during cross examination by the prosecutor. Consequently, we find no merit in the sixth ground of appeal and accordingly dismiss it.

As for the seventh ground of appeal, Mr. Nkoko submitted that considering the contradictions and weak prosecution evidence on record, it is clear that the prosecution case was not proved to the required standard. He thus reiterated his earlier submission with regard to the invalidity of the information, contradictions in the arrest of the appellant and broken chain of custody and implored us to allow the appeal and acquit the appellant.

The submission was strongly resisted by Ms. Helela on the contention that the prosecution case was proved beyond reasonable doubt. She argued that as demonstrated in the submission made in opposing the appeal in the previous grounds of appeal, the trial court properly believed the prosecution witnesses as the defence case did not raise any reasonable doubt.

On our part, considering the foregoing deliberation with regard to previous grounds of appeal, we have no hesitation to state that the prosecution case was proved beyond reasonable doubt.

As we have amply intimated above in the course of analysing the evidence on record, we are satisfied that the trial judge properly believed the prosecution witnesses as credible since the appellant's defence did not raise any doubt on his arrest, search and being found in possession of 31 packets which, upon analysis, were found to contain a narcotic drug known as cocaine hydrochloride as evidenced by exhibit P3. We are also satisfied that the oral evidence on record indicates categorically that the chain of custody on seizure, handling, custody, transfer and analysis of exhibits P1(a) and P1(b) was not broken and there was no sign that the exhibits could have been tampered with at any stage before the same were tendered at the trial

and admitted in evidence. In the event, we dismiss the seventh ground of appeal for lacking merit.

In the circumstances, we sustain the appellant's conviction and uphold the sentence imposed by the trial court and ultimately find the appeal devoid of merit. In the result, we dismiss the appeal.

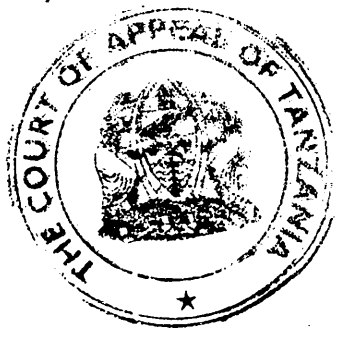
DATED at **DAR ES SALAAM** this 15th day of August, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of August, 2022 in the presence of Ms. Abbriaty Kivea, learned counsel for the Appellant and Ms. Elizabeth Mkunde, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL