**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: NDIKA, J.A., KITUSI, J.A. And MAKUNGU, J.A.)**

**CRIMINAL APPEAL NO. 7 OF 2018**

**KHALIFA HASSAN MALINGULA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the Resident Magistrate's Court of Moshi at Moshi)**

**(Tiganga, PRM – Ext. Jur.)**

**dated the 27th day of February, 2019**

**in**

**Extended Jurisdiction No. 12 of 2016**

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## JUDGMENT OF THE COURT

26th & 29th September, 2022

**KITUSI, J.A.:**

In the exercise of Extended Jurisdiction, Hon. Tiganga, Principal Resident Magistrate (as he then was), sitting at Moshi Resident Magistrate's Court, convicted Khalifa Hassan Malingula, the appellant, of the offence he had been charged with. The appellant was charged with possession of Narcotic Drugs, an offence under section 16(1)(a) of the Drugs and Prevention of Illicit Traffic in Drugs Act as amended by section 31 of the written Laws (Miscellaneous Amendments) (No 2)

Act No. 6 of 2012. It was alleged that he was found in possession of heroin hydrochloride weighing 2.98 grams.

The prosecution sought to establish that acting on a tip obtained from one Pendo Julius, the police led by PW2 came to suspect the appellant as being in possession of drugs. Incidentally, the police had pounced on Pendo Julius at Moshi central bus station in the course of a routine patrol, only to find her in possession of narcotic drugs cleverly struck in a mobile phone charger. In the course of interrogations, Pendo agreed to give the appellant a Judah's kiss, by calling him to a spot where he walked into the police and got arrested. The appellant disclosed to PW2 and other police officers, PW3 and PW4 who were together with him, that he lived at an area known as Majengo Arabica, within Moshi municipality and led them to the house. This point forms a subject of animated arguments both at the trial and before us.

The prosecution led evidence to prove that when PW2, PW3 and PW4, all police officers, got at the appellant's residence led by him, they found his mother who introduced herself by the name of Getrude. When they told Getrude that they were there to search her son's room she picked the key and opened the room in which after

search, the drugs were found. So, it is the prosecution's case that the room was being occupied and controlled by the appellant.

On the other hand, the appellant has maintained that he no longer occupied nor controlled that room because he had moved to another place three months earlier, upon getting married. He has not rebutted the fact that the drugs (Exhibit P1) were indeed found in that room following a search by the police in the presence of a ten-cell leader who testified as PW5. A certificate of seizure was prepared and duly signed by the police, the appellant and PW5 as an independent witness. The drugs were kept in the police exhibit room before being transmitted to the Anti-Drug Unit (ADU). PW1 a government chemist, confirmed that the substance he received from PW4 was heroine hydrochloride weighing 2.98 grams. He prepared a report (exhibit P2) to that effect.

As intimated earlier, the appellant's main line of defence was that he no longer lived in the room from which the drugs were retrieved.

The learned Principal Resident Magistrate with extended jurisdiction accepted the evidence of PW2, PW3 and PW4 that it was

the appellant who led them to the house at Majengo Arabica so he should not be heard saying he did not live there. Although the learned Magistrate appreciated the fact that there were contradictions in the prosecution case, he considered them to be minor and rejected the defence case which had not been hinted on earlier by way of cross-examinations. Resolving an argument by the appellant's counsel that the prosecution should have called the appellant's mother to the witness box, the learned Magistrate stated that the prosecution would not have done so because they had no way of anticipating that the defence would come up with the story denying residence at the house in Majengo Arabica. Further, he stated that if the appellant considered his mother's evidence material, he could have called her to back up his defence.

There was another factor which the learned Magistrate took into account in concluding that the appellant was the occupant of that room, but we shall make reference to it later in due course.

Satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt, the learned Principal Resident Magistrate convicted and sentenced him to life imprisonment.

Aggrieved, the appellant raised nine grounds of appeal which he supplemented with three more grounds.

The irony of the appellant's appeal is that while he made no attempt to dispute the fact that the drugs were found in that room but only maintained that he had no control over it, he has now raised issue with such things as the legality of the search (ground 1 of the supplementary memorandum of appeal) and chain of custody in grounds 3 and 4. He did not specifically submit on those grounds though, having adopted all grounds of appeal and left the matter for our consideration.

Ms. Veridiana Mlenza learned Senior State Attorney representing the respondent Republic submitted on all grounds including the three grounds referred to above. Considering her focused submissions on the three grounds, we go along with her that the search was impromptu falling under section 42 of the Criminal Procedure Act (CPA) and the chain of custody was not broken. We therefore dismiss the third and fourth grounds of appeal as well as the first ground of appeal in the supplementary memorandum of appeal. We are satisfied that the search observed the relevant procedure as testified to by

PW5, an independent witness, and that after retrieving the drugs, its chain of custody remained unbroken.

Similarly, we do not think this is a case in which the issue of involvement of the assessors can be brought up. In the second ground of appeal the complaint is that the learned trial magistrate did not direct the assessors on the ingredients of the offence charged. Ms. Mlenza conceded to that ground but pointed out that contextually, the assessors gave informed opinions which shows that they knew the ingredients of the offence.

The complaint in the seventh ground of appeal that the assessors cross - examined witnesses is equally a wild shot, in our view. As submitted by Ms. Mlenza referring us to relevant pages, there was no such infraction. Furthermore, as the Court held in **Asha Mkwizu Hauli v. Republic,** Criminal Appeal No. 80 of 1985 (unreported) even if these infractions had been established, the conclusion reached by the trial court would not have been affected, considering the evidence on record.

It should also be recalled, that at the time the prosecution witnesses testified and allegedly cross-examined by the assessors, the

pivotal issue of the appellant's residence at Majengo Arabica had not been introduced. On our reflection, it occurs to us that the questions that were put by the assessors to the appellant (DW1) were but for clarification only. For those reasons, we find no merit in the second and seventh grounds of appeal, so we dismiss them.

Next, we consider ground eight alleging that the prosecution case suffered from contradictions of its witnesses. Ms. Mlenza's response was that there were no material contradictions, and we instantly agree with her. We think the only contradictions that would touch the outcome of this case is that which would be connected to the question whether the appellant lived or had control of the room in which the drugs were found. We have seen none worth our attention, so we dismiss this ground.

We could not figure out what the appellant had in mind when he complained under the sixth ground of appeal that the trial court applied double standards. Neither could the learned Senior State Attorney fathom what the complaint is all about, and the appellant was of no assistance. As the ground could only be a misconception, we dismiss it.

We turn to the fifth ground of appeal which we reproduce below: -

> *"That the learned trial magistrate with Extended Jurisdiction erred in law and in fact in holding that the appellant was the occupier and had the control of the searched room despite the fact that the one who possessed the keys and opened the door of the searched room was one Getrude Ludovick Ngoti (who was not summoned, the appellant's mother) and there was no explanation on how she came in possession of the said keys. Therefore, this corroborated the appellant's version and claim that he had no control on the said room."*

We are going to consider this ground along with ground nine in the main memorandum of appeal and ground three of the supplementary memorandum of appeal. These two grounds challenge the trial court for not considering the defence case. As the main line of defence was that the appellant did not live in the searched room these two grounds will be discussed simultaneously with ground 5 which raises the same issue.

Addressing these grounds, Ms. Mlenza submitted that the trial court cannot be faulted for concluding that the appellant lived in the

room the subject of the search because PW2, PW3, PW4 and PW5 were not contradicted by him by way of cross-examination. Citing to us the case of **Nyerere Nyangue v. Republic,** Criminal Appeal No. 67 of 2010 (unreported) on the principle that failure to cross-examine on an important point amounts to accepting the facts testified on, she argued that the appellant accepted the testimonies of the prosecution witnesses who said that he lived at Majengo Arabica. She also drew our attention to the fact that the appellant even signed the seizure certificate.

As for the complaint that the defence case was not considered, Ms. Mlenza submitted that it was considered by the trial court which in the course of doing so observed, and rightly so in her view, that the appellant ought to have told the court who then was the occupier of the room.

There were several reasons that were considered by the trial court in concluding that the prosecution had proved that the appellant occupied and/or had control of the room. One of the reasons was that at the time of admitting the appellant to bail, he cited Majengo Arabica as his place of abode. This is the point we had promised to discuss at a later stage. We asked Mr. Mlenza whether the learned

trial Magistrate was correct in taking into account matters which were not part of the evidence on record, and she took exception.

A decision of the court must be informed by evidence and the applicable law as we have said in a number of times. See for instance the case of **Athanas Julius v. Republic**, Criminal Appeal No. 498 of 2015 cited in **Shija Sosoma v. The D. P. P**, Criminal Appeal No. 327 of 2017 (both unreported). What the appellant disclosed to the trial court at the time of admitting him to bail could not be treated as evidence because it was not stated under oath or affirmation as required by law. So as submitted by Ms. Mlenza, the trial court erred in relying on it to conclude about the appellant's abode.

However, there were other factors relied upon by the trial court in concluding that the appellant was the occupant of or had control over the room. The learned trial magistrate took into account the following reasons. One, he considered the fact that it was the appellant who led the police to the house and secondly, that on getting there he is the one who pointed the room for them. Three, he also considered the conduct of the appellant's mother as confirming that the appellant was the occupier of the room.

In our considered view, on the reasons cited above, the learned trial magistrate was entitled to the conclusion that the appellant was the occupier or had control of the room. Moreover, this line of defence came as an afterthought because throughout when PW2, PW3, PW4 and PW5 testified the appellant never put to them questions suggesting that he intended to raise such a defence. It is a principle of law that an accused person must indicate the theme of his defence beforehand. See **Hatibu Gandhi v. Republic** [1996] T.L.R 12 cited in **John Madata v. Republic,** Criminal Appeal No. 453 of 2017 (unreported). We do not agree with the appellant that the prosecution's omission to call his mother as a witness affected its case. To the contrary we find the appellant's omission to call her to testify in support of his case as being rather strange, begging the question whether he suspected she would blow his cover.

In addition, we are not losing sight of the fact testified to by PW2, PW3 and PW4 that the appellant's arrest was facilitated by his own associate so it cannot be said that he was a victim of a fabricated case.

From the totality of all this, we are satisfied that the appellant lived in the room from which the drugs were retrieved or he still

retained control over it, a finding that renders the fifth ground of appeal devoid of merit. We dismiss it. Similarly, we dismiss ground nine of the substantive memorandum of appeal and ground three of the supplementary memorandum of appeal because we are satisfied that the trial court duly considered the defence case.

With those conclusions, the appeal has no merit so it stands dismissed.

**DATED** at **MOSHI** this 28th day of September, 2022.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

This Judgment delivered this 29th day of September, 2022 in the presence for the Appellant in person and Ms. Verediana Mlenza, learned Senior State Attorney, Ms. Sabitina Mcharo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.


C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**