IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 388 OF 2021

MWITEKA GODFREY MWANDEMELE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)
(Rwizile, J.)
dated the 23rd day of June, 2021
in
Criminal Sessions Case No. 19 of 2015

JUDGMENT OF THE COURT

21st & 29th September, 2022

KEREFU, J.A.:

Mwiteka Godfrey Mwandemele, the appellant herein, was charged with the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of NarcoticTraffic in Drugs Act, [Cap. 95 R.E. 2002] (the Act). The prosecution alleged that on 11th May, 2011 at the Julius Nyerere International Airport (the JNIA) within Ilala District in Dar es Salaam, the appellant trafficked in a narcotic drug, namely, cocaine hydrochloride, weighing 1,112 grams, valued at TZS 55,600,000.00.

The appellant pleaded not guilty to the charge. However, after a full trial, he was convicted as charged and sentenced to twenty (20) years imprisonment and also to pay a fine at the tune of TZS 166,980,000.00

which constituted three times the value of the drug he was found trafficking. In imposing the jail term, the learned trial Judge (Rwizile, J.) put it in this way:

> *"I therefore sentence him to a minimum sentence of 20 years, but because he has been on remand since 11th May, 2011 which is 10 years now, he is to serve a sentence of 10 years in prison. On top, he should pay a fine of TZS 166,980,000.00."*

It is noteworthy that, initially, the appellant stood trial before Arufani, J. who convicted him as charged and sentenced him to twenty (20) years imprisonment and to pay a fine at the tune of TZS 166,800,000.00 which constituted three times the value of the drug he was found trafficking. On appeal, in Criminal Appeal No. 56 of 2016, this Court nullified the entire proceedings, quashed conviction and set aside the sentence upon being satisfied that the trial was irregular on account of failure by the trial judge to sum up the case to the assessors as required by section 298 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (now R.E. 2022) (the CPA). Consequently, the Court ordered a trial *de novo* before another Judge and a different set of assessors. In compliance with the Court's order, hearing of the case commenced afresh before Rwizile, J. who, after hearing

evidence from both sides, he found the appellant guilty, convicted and sentenced him as indicated above.

In essence, the substance of the prosecution case, as obtained from the record is to the effect that the appellant arrived at the JNIA from Sao Paulo Brazil via Doha, Qatar on 11th May, 2011 at 15:00 hours aboard a Qatar Airways flight number QR544. Salma Idd Chaurembo (PW6), an Immigration Officer, testified that she was managing an immigration counter at the arrivals lounge at the JNIA on 11th May, 2011, in the afternoon, when the appellant, having arrived, presented to her his Tanzanian Emergency Travel Document (the ETD). PW6 testified further that, while at the counter, she saw the appellant trembling and sweating. Upon asking him what was the problem, the appellant requested her to assist him to get out of the airport as he admitted to have carried items in his stomach and clothes. PW6 became suspicious, and thus, after scanning, stamping and signing the appellant's ETD, she alerted her supervisor and officials of the Anti-Drugs Unit (ADU) at the airport and handed the appellant to them.

No. D.7262 Detective Station Sergeant Mashaka (PW17) and F.6059 Detective Station Sergeant Athuman (PW9) were the two police officers from ADU that took up the matter from PW6. According to PW17, they took

the appellant to their nearby office for inspection and found him with four pellets of a narcotic drug hidden in his shorts/pens that he wore under his trousers. Thereafter, the appellant was put under the observation of the police at the JNIA terminal from 11th May, 2011 to 14th May, 2011.

At different dates and times during surveillance, the appellant excreted in a special toilet located at the JNIA terminal a total of sixty pellets of the drug. Each time of defecation was witnessed by police officers and independent witnesses whose particulars were filled in the respective observation form signed by the appellant and the said witnesses to attest as to the correctness of its details. Michael Ladislaus Bunyaga (PW4), Jafferson Deus (PW7), Shaban Babili (PW8), Amir Ally Abasi (PW10), Ernest John Lukaza (PW12), Lunganyi Chongo (PW13) and Ramadhani Msoba (PW14), who were independent witnesses, confirmed in their respective testimonies before the trial court to have taken turns to eyewitness the defecation exercise and signed the said forms. The observation forms signed by the said witnesses, police officers who supervised the respective exercise and the appellant were tendered by Damari Assery Tuvana (PW1) and admitted in evidence as exhibit P5 indicating a total of sixty pellets of drug seized from the appellant.

In the end, a total of seized sixty-four pellets of drug were handed to SSP Neema Andrew Mwakagenda (PW5), a police investigator at ADU and custodian of exhibits that included all seized drugs suspected to be narcotic drugs. In her testimony, PW5 acknowledged to have received from PW9 and PW17, between 11th and 14th May, 2011, a total of sixty-four pellets, suspected to be narcotic drugs. Having recorded the substances in the appropriate register, she packed them in a khaki envelope, which she labelled, sealed and marked with a code - KLR/IR/146/2011. PW5 testified further that the packing exercise was witnessed by the appellant, Zainabu Duwa Makilane (PW3) who was the ten-cell leader and an independent witness, PW9, PW17, Assistant Commissioner of Police Godfrey Nzowa and other police officers from ADU. The said envelope was subsequently handed over to the office of the Chief Government Chemist (CGC) along with a letter requesting for a chemical analysis of the said drug pellets. Bertha Fredrick Mauya (PW11), a Chemical Analyst at the Office of the CGC, gave elaborate details on how she received and analyzed the substances. In particular, PW11 testified that she opened the sealed envelope in the presence of several police officers, led by PW5, as well as other staff members from the CGC's Laboratory. She then conducted the analysis and established that the said drug, weighing 1,112 grams, was cocaine hydrochloride. The pellets were later taken to Christopher Joseph

Shekiondo (PW2), who was the Commissioner for the National Coordination of Drug Control Commission at the material time. Upon assessing them, PW2 certified that they valued TZS 55,600,000.00 and issued a certificate to that effect (exhibit P3).

In his defence, the appellant denied to have ever trafficked in narcotic drugs. More particularly, he refuted to have travelled from Brazil via Doha to Dar es Salaam or being the holder of the ETD. Specifically, the appellant stated that, on 11th May, 2011 at 10:00 hours he was at Tabata Segerea area going towards a bus station and certain police officers, who introduced to him as Fidelis and Gabriel arrested him alleging that they have been tipped that he was connected to a network of drug dealers. The said police officers took him to the police station at JNIA for interrogation. The appellant lamented that, despite his denial, he was remanded to the custody and later, was taken to ADU at Kurasini where he was interrogated by Godfrey Nzowa. He was then taken to Centra Police Station and later to the court where he was charged as indicated above.

When the respective cases on both sides were closed, the learned trial Judge summed up the case to the three lady assessors who sat with him at the trial. In response, the assessors unanimously returned a verdict of guilty against the appellant. Having concurred with the unanimous

verdict of the assessors, the learned trial Judge was satisfied that the charged offence was proved to the required standard. He thus convicted and sentenced the appellant as intimated above.

Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. In the memorandum of appeal, the appellant had indicated nine grounds which raise the following main complaints, that, **one,** the appellant's conviction is based on an incurably defective charge that contained insufficient particulars which did not disclose the place, time and number of seized pellets that the appellant was confronted to defend; **two,** although PW6 and PW17 testified that the appellant was arrested at JNIA when arrived from Brazil by Qatar Airways and found in possession of narcotic drug, there was no passport or ticket tendered to prove that fact; **three**, the testimonies of PW6 and PW17 are tainted with contradictions on how the appellant was suspected and arrested hence unreliable; **four,** the trial Judge erred in law to rely on unsworn evidence of PW17; **five,** the trial Judge erred in law and fact to hold that PW4, PW7, PW8, PW10, PW12, PW13 and PW14 were independent witnesses of defecation of 60 pellets without considering that they were all from the law enforcement agencies responsible for narcotic drugs interdiction program in the country who had interest to serve; **six**, exhibit P5 was un-procedurally admitted in evidence as its contents were not read out after its admission; **seven,** the

evidence of PW5 was not properly evaluated and it was in contradictory to that of PW3 and inconsistent to her evidence in Criminal Appeal No. 472 of 2017; **eight,** the appellant's defence of alibi was not considered; and **finally,** the prosecution case was not proved to the required standard.

At the hearing of the appeal, the appellants appeared in person without legal representation whereas Mses. Clara Charwe, learned Senior State Attorney and Estazia Wilson, learned State Attorney joined forces to represent the respondent Republic.

Upon taking the floor, the appellant adopted his grounds of appeal and the written arguments he lodged in Court on 14th September, 2022. He then, briefly clarified on the seventh ground and urged us to consider all the grounds, allow the appeal and set him free.

On the adversary side, Ms. Charwe after having stated categorically that the respondent is opposing the appeal, she intimated that she will respond to the second, third, fifth, sixth and seventh grounds, while her colleague, Ms. Wilson, will argue the first, fourth, eighth and nineth grounds. We propose to address the parties' submissions in the course of determining the grounds of appeal in the order we have reformulated them above. However, at this stage, we wish to state that, this being a first appeal, the Court is enjoined to re-evaluate the evidence and draw its own

inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses – See **D.R. Pandya v. Republic** [1957] E.A 336 and **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported).

We wish to begin our determination of the appeal by addressing the appellant's complaint in the first, fourth and sixth grounds of appeal, as they raise issues of irregularities in the trial court's proceedings.

On the first ground, the appellant submitted that the charge he was charged with was fatally defective for containing insufficient particulars of the offence to enable him to know the nature of the offence he was going to face to marshal his defence. That, the said charge did not disclose the place, time and number of pellets seized and how he trafficked either by importing or exporting the same. It was his argument that failure by the prosecution to indicate such particulars is a fatal irregularity which had occasioned injustice on his part. To buttress his position, he cited the cases of **Mussa Mwaikunda v. Republic** (2006) T.L.R. 387 and **Hamis Mohamed Mtou v. Republic,** Criminal Appeal No. 228 of 2019 (unreported).

In response, Ms. Wilson challenged the appellant's claim by arguing that the charge was properly crafted in accordance with sections 132 and

135 of the CPA as it contained all sufficient information and details to enable the appellant to appreciate the charge levelled against him. She argued that, in the circumstances of this case, it was impracticable to state the time and number of pellets involved at the time of crafting the charge because the exercise of defecation of the pellets took place from 11th May, 2011 to 14th May, 2011. For clarity, she referred us to page 9 of the record of appeal where the information contained the name of the appellant, the type of the offence committed, place, type and weight of the narcotic drug involved and its value. To bolster her argument, she cited our decision in **Anna Jamaniste Mboya v. Republic,** Criminal Appeal No. 295 of 2018 (unreported).

Having closely examined the information found at page 9 of the record of appeal, we find the appellant's claims under this ground unfounded. We shall demonstrate. The offence the appellant was charged with is governed by section 16 (1) (b) (i) of the Act which provides that:

> *"16 (1) Any person who –*
>
> *(a) NA*
>
> *(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable –*

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

It is undisputable fact that, every charge or information drawn must conform with the guidelines under the provisions of section 132 of the CPA which provides that:

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

In the instant appeal, particulars of the offence the appellant was charged with, as appearing at page 9 of the record of appeal, indicated that:

"Mwiteka Godfrey Mwandemele, on or about the 11th day of May, 2011 at Julius Nyerere International Airport within Ilala District in Dar es Salaam Region, did traffic in narcotic drugs namely; Cocaine Hydrochloride weighing 1112.0 grams valued at Tanzania Shillings Fifty-Five Million Six Hundred Thousand Only (Tshs.55,600,000/=)."

It is patently clear that, the above particulars had indicated the nature of the offence, the name of the appellant, the date and place of the commission of the offence, the narcotic drugs involved as well as its weight and value. Although, we agree with the appellant that issues of time, number of pellets seized and the modes of trafficking were not included, we hasten the remark that, as eloquently argued by Ms. Wilson, the said infraction was not fatal to render the information defective. The same was a minor omission which did not prejudice the appellant as the same was cured by the evidence of prosecution witnesses. For instance, in her oral account, PW6 was quite vivid that the appellant arrived on 11th May, 2011 at around 15:00 hours from Sao Paulo via Doha aboard Qatar Airways. Furthermore, and as for the time of commission of the offence, PW4, PW7, PW8, PW10, PW12, PW13 and PW14 who were independent witnesses to the defecation exercise, their evidence indicated that the said defecation exercise took place from 11th May, 2011 to 14th May, 2011. We therefore agree with Ms. Wilson that mentioning the exact time and the number of pellets, when the appellant was arrested and first found in possession of the narcotic drugs, in the circumstances of this appeal was impracticable. We find support in our previous decision in **Khamis Said Bakari v. Republic,** Criminal Appeal No. 359 of 2017 (unreported). In that case, like in the present, the appellant complained that the information was defective

for containing insufficient particulars of the offence. Having found that the information was in compliant with the dictates of section 132 and 135 of the CPA, we stated that:

> *"...the particulars of the offence in this case indicate the name of the appellant as the accused person, and that he trafficked in a narcotic drug known as Heroin Hydrochloride weighing 964,24 grammes worth TZS. 43,390,800.00 at the JNIA in Ilala District in Dar es Salaam. We cannot help but wonder what other detail the appellant expected in the particulars of the offence. Accordingly, the first ground of appeal fails."*

[See also the case of **Anna Jamaniste Mboya** (supra) cited to us by Ms. Wilson].

Being guided by the above authorities, we agree with Ms. Wilson that the information contains sufficient particulars to enable the appellant appreciate the charges levelled against him to marshal a meaningful defence. In our view, and as rightly put by Ms. Wilson, all cases referred to us by the appellant on this aspect are distinguishable and not applicable in the circumstances of this case. For instance, in **Hamis Mohamed Mtou** (supra), the Court at page 12 to 13 of that decision, apart from noted the insufficient particulars in the information, it also observed that the evidence on record did not cure that omission, which is not the case herein. This ground is therefore, unmerited and we hereby dismiss it.

The appellant's complaint under the fourth ground should not detain us, as both parties were concurrent, rightly so, in our view that the evidence of PW17 was received contrary to the requirement of section 198 (1) of the CPA. Indeed, the record bears it out at page 327 of the record of appeal that the evidence of PW17 was taken without oath or affirmation. On the effect of such omission, the appellant relied on our previous decision in **Hamisi Chuma @ Hando Mhoja and Another v. Republic,** Criminal Appeal No. 371 of 2015 (unreported) and urged us to discount the evidence of PW17 from the record, while Ms. Wilson cited the case of **John Hilarious Nyakibari v. Republic,** Criminal Appeal No. 125 of 2020 (unreported) and urged us to find that the omission was only a slip of the pen. To resolve this matter, we find it apposite to reproduce the provisions of section 198 (1) of the CPA which provides that:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

In terms of the above provision, it is a mandatory requirement that a witness must be sworn or affirm before his evidence is recorded. If such evidence is received without oath or affirmation, it amounts to no evidence in law and thus it becomes invalid and with no evidential value. This Court

has repeatedly emphasized the need for every witness who is competent to take oath or affirmation before the reception of his or her evidence. For instance, in **Hamisi Chuma @ Hando Mhoja and Another** (supra) referred to us by the appellant, when faced with an akin situation, we categorically stated that:

> *"...since PW2 -PW7 who were competent witnesses were not, according to the record, examined on oath or affirmation, their testimony is of no evidential value. The same deserves to be expunged from the record, as we hereby do."*

Similarly, in the present appeal, we agree with the appellant that, since PW17 was not examined on oath or affirmation, his testimony is of no evidential value and deserved to be expunged from the record as we hereby do. On this basis, we allow the fourth ground of appeal.

In the sixth ground, the appellant contended that exhibit P5 was un-procedurally admitted in evidence as its contents was not read out after its admission as required by the law. Ms. Charwe vehemently disputed the appellant's claim by referring us to page 285 of the record of appeal and argued that the contents of that exhibit was read out in court by PW9 who was familiar with the same. She thus urged us to find the appellant's complaint on this ground unfounded.

Having revisited the transcript of PW9's evidence, we agree with Ms. Charwe that, indeed, the record of appeal at page 285 clearly indicates that the contents of exhibit P5, after its admission in evidence, was read out in court by PW9. We thus find the appellant's complaint in this ground devoid of merit and we dismiss it.

Back to the remaining grounds, we have observed that the appellant's main complaint, in the second and third grounds, is on the contradictions and inconsistencies between the evidence of PW6 and PW17 on how he was suspected, searched and arrested. This has featured well at pages 5 to 8 of the appellant's written submission filed in Court on 14th September, 2022. Now, having expunged the evidence of PW17 from the record, we find the appellant's claim on the alleged contradictions to have no basis. We have further noted that, in the second ground, the appellant has also challenged the prosecution case for failure to tender the travel air ticket and passport, during the trial, to prove that he was arrested at the JNIA upon arrival from Brazil.

We wish to state that, having critically evaluated the entire evidence on record, we are satisfied that there is sufficient direct oral account of PW6 which, in our view, clearly stated how the appellant arrived at the JNIA, suspected and arrested. PW6, in her direct oral account found at

pages 318 to 323 of the record of appeal, clearly testified on, **one,** how the appellant arrived on 11th May, 2011 at around 15:00 hours from Sao Paulo via Doha aboard Qatar Airways; **two,** how she attended the appellant at her counter and started trembling, sweating and asking for PW6's assistance to get out of the airport because he carried narcotic drugs in his stomach and clothes; **three,** how she became suspicious and reported the matter to her supervisor; and later, **four,** how she handed over the appellant to her supervisor and then to ADU officials for further investigation. In our considered view, the learned trial Judge correctly decided to believe the evidence of PW6 on this aspect, as he stated at page 399 of the record of appeal that:

> *"**There is no reason therefore to believe that PW6 told lies.** There is also no reason to say or suggest that, the prosecution witnesses on this material aspect, although they differ in the manner in which he was arrested, this could affect the substance of their evidence. **He was therefore arrested at the airport in the manner PW6 told the court."** [Emphasis added].*

In addition, PW9 who supervised the defecation exercise and prepared exhibit 5, also testified on how the said exercise was conducted at the JNIA. Moreover, in their direct oral accounts, PW4, PW7, PW8, PW10, PW12, PW13 and PW14, who were independent witnesses to the

defecation exercise, also testified how on different dates and time, they witnessed the appellant defecated the pellets in a special toilet located at the JNIA. This, was as well supported by the evidence of PW15 and PW16, the police officers who also participated in the said exercise. Besides, after each defecation, the respective witnesses, the appellant and the other officers, signed observation forms (exhibit P5) acknowledging that the appellant was found at the JNIA in possession of substance suspected to be narcotic drugs. It is therefore our considered view that, the finding of the learned trial Judge on this aspect, is correct and cannot be faulted. See our previous decisions in **Malungus Chiboni @ Silvester Chiboni & John Simon v. Republic,** Criminal Appeal No. 8 of 2011, **Shabani Said Kindamba v. Republic,** Criminal Appeal No. 390 of 2019 and **Wallenstein Alvares Santillan v. Republic,** Criminal Appeal No. 68 of 2019 (all unreported). Consequently, we find second and third grounds of appeal baseless and accordingly dismiss them.

We now turn to the fifth ground where the appellant challenged the credibility of PW4, PW7, PW8, PW10, PW13 and PW14 who were independent witnesses to the defecation of 60 pellets from the Immigration Department and TRA. It was the appellant's contention that none of the said witnesses was truly neutral and independent. That, the said witnesses

being law enforcement agents, had an interest to serve. To buttress his point, he cited the case of **Michael Haishi v. Republic** [1992] T.L.R. 92.

Ms. Charwe disputed the appellant's claim by arguing that there is no law in this country which prevents the law enforcement agents to testify on a matter before the court. It was her strong argument that, PW4, PW7, PW8, PW10, PW13 and PW14 were all called to witness the appellant defecating the pellets, at different dates and times, as independent witnesses. She said that, despite being law enforcement agents, they had no interest to serve as alleged by the appellant. To support her stance, she referred us to our previous decision in **Khamis Said Bakari v. Republic,** Criminal Appeal No. 359 of 2017 (unreported).

Having considered the parties submissions on this ground, we agree with Ms. Charwe that there is no law preventing law enforcement agents from testifying on a matter related to their work or otherwise. In our considered view, the attack on the credibility and believability of PW4, PW7, PW8, PW10, PW13 and PW14 testimonies solely on the ground of their occupation in public service is implausible. In **Goodluck Kyando v. Republic** [2006] T.L.R. 363 this Court categorically stated that:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Taking into account the circumstances of this appeal, and the fact that each of the independent witness to the defecation process witnessed a different number of pellets on different dates and times, we are unable to agree with the appellant that their evidence was framed. It is also on record that, particulars of each excretion were filled in different respective observation forms, well signed by the respective independent witness, the officer supervising the event and the appellant. It is also on record that the learned trial Judge found the said witnesses credible and believed them. As such, we find no warranting reasons of discounting the evidence of PW4, PW7, PW8, PW10, PW13 and PW14 from the record.

The appellant's complaint on the seventh ground hinges on the contradiction between the evidence of PW3 and PW5. He contended that, the evidence of PW5 was contradictory to that of PW3 and inconsistent to her testimony in Criminal Appeal No. 472 of 2017 on how exhibit P1 was labelled and stored. He clarified that, at page 262 of the record of appeal, PW5 testified that she parked exhibit P1 in a khaki envelope with a sellotape, sealed it and then wrote on it with a code No. KLR/IR/146/2011, while PW3 who witnessed the parking exercise, testified at page 249 of the

same record that she did not see any writings on the said envelope. He also contended that, while PW5 said that there were seven envelopes, PW3 said that she found PW5 with one envelope. On that basis, the appellant urged us to find that PW3 and PW5 were unreliable witnesses.

In response, Ms. Charwe argued that there are no contradictions between the evidence of PW3 and PW5 on how exhibit P1 was parked and labelled. She clarified that, PW5 testified on how she previously received the pellets from different witnesses and on different dates and time in several envelopes and then parked all the 64 pellets in one khaki envelope, while PW3 only stated on how she witnessed the 64 pellets parked in that one khaki envelope. She thus insisted that PW3 and PW5 were credible and reliable witnesses.

Having considered the contradictions and discrepancies complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW3 and PW5. We say so, because at page 262 of the record of appeal, PW5, when explained on how she parked and labelled exhibit P1, she testified that:

> *"I remember I prepared envelope, khaki paper, sellotape and seal (lakiri). Those pellets were from Mwiteka Godfrey Mwandemele who was present, senior SAC -Godfrey Nzowa, witness called Zainab Duwa, and some other pollce officers at*

ADU. These people witnessed as I close 64 pellets. I opened those envelopes I used to keep them...I used the khaki paper made it like an envelope, then parked in the same. I wrote on it KLR/IR/146/2011. I closed the same using the sellotape. I placed in in the A3 khaki envelope, I sealed with sellotape, I then used the fire seal..."

Then, at page 249 of the same record, PW3 who witnessed the parking exercise testified that:

"Afande Neema (PW5) took papers of khaki and put on the table and took the envelope without any writings and started to count it. Those tabs were 64 as she counted one by one, she rolled them in that khaki paper. She tied with their sellotape and pure a water seal (lakiri). The accused was present and other police officer as I said. Then she tied them with a sellotape."

From the above extract, it is clear that, when PW5 mentioned that there were several envelopes, she was referring to the envelopes she used to park the pellets having received them on different dates and times. In respect of the envelope used to park the 64 pellets, both, PW3 and PW5 testified that they were parked in one khaki envelope. As intimated above, the fact that PW3 testified that the envelope was without any writings i.e KLR/IR/146/2011, is a minor defect which does not go to the root of the

matter and it does not contradict the fact that the appellant was found in possession of narcotic drugs.

At this juncture, we deem it necessary to reiterate that the law regarding contradictions and inconsistencies in the evidence is settled. That, contradictions by any particular witness or among witnesses cannot be avoided in any particular case. In **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No. 92 of 2007 (unreported), the Court held that minor contradictions, discrepancies or inconsistencies which do not go to the root of the case, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case. That said, we find the seventh ground with no merit and we cannot help but wonder why the appellant decided to peg this ground with PW5's evidence contained in Criminal Appeal No. 472 of 2017 which is not even before us.

On the eighth ground, the appellant faulted the learned trial Judge for failure to consider his defence of *alibi* that, on 11th May, 2011 at about 10:00 hours he was arrested by police offers namely, Fidelis and Gabriel at Tabata Segerea and brought to the police station at the JNIA. That, thereafter, he was taken to ADU offices and then to the Central Police Station where he was remanded until 16th May, 2011. Although, the

appellant admitted that he raised the said defence after the closure of the prosecution case, he insisted that, the prosecution case had ample time to call on for the detention register from the Central Police Station to verify those facts. To bolster his argument, he cited the cases of **Richard Otieno @ Gullo v. Republic,** Criminal Appeal No. 367 of 2018, **Aloyce Maridadi v. Republic,** Criminal Appeal No. 208 of 2006 (both unreported) and argued that failure by the trial court to consider his defence had occasioned a miscarriage of justice on his part.

On this, it was the argument of Ms. Wilson that the learned trial Judge was justified to disregard the appellant's defence of *alibi* because, the appellant did not give prior notice of his defence of *alibi* to the court and the prosecution as required by the provisions of section 194 (4) and (5) of the CPA. To support his proposition, he cited the case of **Kubezya John v. Republic,** Criminal Appeal No. 488 of 2015 (unreported).

It is, we think, important to note that matters of defence of *alibi* are regulated by section 194 (4), (5) and (6) of the CPA. The said provisions provide that:

"194 (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case;

(5) Where an accused person does not give notice of his intention to rely on the defence of aiibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed; and

(6) If the accused ***raises a defence of alibi without having first furnished the prosecution*** *pursuant to this section,* ***the court may in its discretion, accord no weight of any kind to the defence."*** *[Emphasis added].*

In the case of **Charles Nanati v. Republic,** Criminal Appeal No. 286 of 2017, the Court, while relying on the case of **Hamisi Bakari Labani v. Republic,** Criminal Appeal No. 108 of 2012 (both unreported) it clearly summarized the scenarios to be taken into account by a person who wishes to rely on the defence of *alibi,* that:

> *"The law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case (section 194 (4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case,* ***short of that the court may on its own discretion accord no weight to that defence****." [Emphasis added].*

It is on record that, the appellant in the present case, opted to pursue the last scenario indicated under section 194 (6) of the CPA as he did not to give notice on his defence of *alibi* neither before the hearing of the case nor before closure of the prosecution case. In the circumstances, we agree with Ms. Wilson that the learned trial Judge properly exercised his discretion under section 194 (6) of the CPA.

We have however given due consideration to the appellant's defence of alibi against the oral account by PW6 that the appellant was arrested on 11th May, 2011 when he arrived from Sao Paulo via Doha aboard Qatar Airways together with the evidence of PW9 who supervised the defecation exercise and prepared exhibit P5 together with the evidence of PW4, PW7, PW8, PW10, PW12, PW13 and PW14 who were independent witnesses to the defecation exercise. We see no plausible reason as why the appellant, who was represented by an advocate, did not raise his defence at the very outset before the hearing of the case. Neither do we see any plausible reason why he did not raise the said defence at the hearing before the closure of prosecution case. Furthermore, it is on record that, in his defence, the appellant did not call any person(s) he was with at the material time or and during his alleged arrest at Tabata Segerea.

We are mindful of the fact that, in his oral submission before us, the appellant indicated that he tried to call his witnesses but the trial court did

not accord him that opportunity. With respect, we find the appellant's submission to be an afterthought because it is not supported by the record. For avoidance of doubt, during the preliminary hearing at page 21 of the record of appeal, the appellant is recorded to have informed the trial court that he is not intending to call any witness. Likewise, at the time of giving his defence and after he was addressed under section 293 (2) of the CPA, he is recorded at page 338 of the same record to have informed the trial court that he opted to fend for himself and will not call any witness nor tender any exhibit. In the case of **Kubezya John** (supra), when we considered the same scenario, we associated ourselves with the decision of the Supreme Court of Uganda in **Kibale v. Uganda** [1999] 1 EA 148 where it was held:

> *"A genuine alibi is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one."*

It is therefore our considered view that, even in this appeal, the appellant's defence of *alibi* that just surfaced in his defence is, nothing but, an afterthought and, in our considered view, it was rightly rejected by the

learned trial Judge. On this basis, we find the appellant's complaint with no merit.

In totality and upon a careful re-appraisal of the evidence on record, we are satisfied that the available credible oral account of PW1, PW2, PW3, PW5, PW6, PW9, PW11, PW15 and PW16 together with that of evidence PW4, PW7, PW8, PW10, PW12, PW13 and PW14 who were independent prosecution's eye witnesses to the defecation exercise and the documentary account contained in exhibits P1, P2, P3, and P5, we find no cogent reasons to fault the finding of the learned trial Judge. We are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt.

Finally, we examined the propriety or otherwise of the sentence of twenty years imposed on the appellant as indicated above ordered to start running at the time of arrest. On this, the appellant cited the case of **Michael Adrian Chaki v. Republic,** Criminal Appeal No. 399 of 2019 (unreported) and submitted that, it was proper for the learned trial Judge to take into account the time he spent in the custody. He thus also urged us, in any case, to consider the time he spent in custody and in remand prison.

On her part, Ms. Charwe faulted the learned trial Judge for ordering the sentence of twenty years imprisonment imposed on the appellant to start running from the date of appellant's arrest. She said, that was improper because, by that time, the appellant was still innocent. To buttress her proposition, she referred us to the case of **Khamis Said Bakari v Republic,** Criminal Appeal No. 359 of 2017 (unreported). She distinguished the case of **Michael Adrian Chaki** (supra) relied upon by the appellant that is not applicable in the current appeal. The learned Senior State Attorney urged us to rectify the said sentence in terms of section 16 (1), (b), (i) of the Act and then rested her case by urging us to find the appellants' appeal unmerited and dismiss it in its entirety.

It is on record, and as indicated above, the appellant was convicted on the offence of trafficking in illicit drugs contrary to section 16 (1) (b) (i) of the Act which provides that, upon conviction is liable "*...to a fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance whichever is the greater, and in addition to imprisonment for life but shall not in every case be less than twenty years.*"

There is no doubt that, in the instant appeal, in sentencing the appellant, the learned trial Judge together with the fine, sentenced him to twenty years imprisonment term which he erroneously ordered to start running from the date of his arrest when he was still innocent. In this

regard, we find it pertinent to recall what we said in **Vuyo Jack v. The Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported) that:

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

[See also our decisions in **Khamis Said Bakari** (supra) cited to us by Ms. Charwe and **Marceline Koivogui v. Republic,** Criminal Appeal No. 469 of 2017; **Livinus Uzo Chime Ajana v. Republic,** Criminal Appeal No. 13 of 2018 and **Allan Duller v. Republic,** Criminal Appeal No. 367 of 2019 (all unreported)].

Being guided by the above authorities, we go along with Ms. Charwe's submission that the sentence imposed on the appellant was improper. The imposed sentence, being the bare minimum under the above provisions, the learned trial Judge hands were tied. We equally agree with Ms. Charwe that the case of **Michael Adrian Chaki** (supra),

relied upon by the appellant on this aspect is distinguishable and not applicable in the current appeal. In that case, the offence involved was grievous harm contrary to section 222 of the Penal Code, which is not the case herein.

In the circumstances, and for the reasons stated above, we find the appeal to have no merit, save for our finding on the propriety of the sentence. Consequently, the appeal stands dismissed in its entirety save for the running of the sentence, which we order the twenty years imprisonment term to commence running from 23rd June, 2021 when the appellant was convicted of the charged offence.

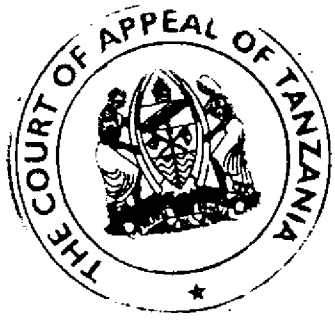
DATED at **DAR ES SALAAM** this 28th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 29th day of September, 2022 in the presence of Appellant in person, and Ms. Imelda Mushi, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL