IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 8 OF 2018

EX. G. 2434 PC. GEORGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mpepo SRM Ext. Jur.)

dated the 15th day of December, 2017

in

Extended Jurisdiction No. 08 of 2016

.....

JUDGMENT OF THE COURT

30th September & 6th October, 2022

KITUSI, J.A.:

This is an appeal from the decision of the Resident Magistrate's Court, extended jurisdiction convicting the appellant of and sentencing him to life imprisonment for the offence of trafficking in narcotic drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of illicit Traffic in Drugs Act, [Cap. 95, R.E. 2002], hereafter the Act. It was alleged at the trial that on 18th May, 2013 at Kilema area within Moshi in Kilimanjaro Region, the appellant, who was then a police officer, was found trafficking 18 bags of

narcotic drugs commonly known as bhang, equivalent to 540 grams, valued at Tshs. 81,000,000/=.

According to the prosecution, it was a sheer coincidence that police officers stationed in Moshi led by SP Duma (PW6) and Inspector Leons (PW2) who had been detailed to execute an assignment at Marangu area, stumbled into the drugs while proceeding to their destination. The time was a bit odd. So, when PW6 and his team were proceeding to Marangu, they saw a vehicle with registration numbers special for the police, by the side of the road and they did the natural thing expected of concerned colleagues, especially considering the time. It was 23:00 hours. They stopped with the view of rendering assistance if there was a problem.

When they inched closer to the vehicle, a person who introduced himself as Corporal Edward of Field Force Unit (FFU) Arusha got out and told the other curious police officers that he had a flat tyre, but had fixed it. He told PW6 and his team that they should not worry because he was ready to proceed with his journey to Holili area to deliver something and that after all, he was in the company of PC George also a police officer based in Arusha, who was in the car. PC George happens to be the appellant.

PW6 and his team drove off but when they were a few meters away, curiosity got the better of them, so they went back to the vehicle. It was at this point that they learnt that their two colleagues from Arusha had no movement permit nor carrying any firearm, which they considered to be unusual. But that was not the only transgression, because PW2 and PW6 soon learnt that their colleagues from Arusha were also carrying sacks of bhang in the car.

When the secret mission had been exposed, the two culprits disclosed that they were headed to Rombo District to deliver the bhang to a person. A certificate of seizure was prepared and signed by the suspects right there. They were arrested, kept in police custody while the 18 bags of the seized bhang were kept in a store. Later samples of the suspected drugs were transmitted to the Chief Government Chemist office (CGC) in Arusha for preliminary test conducted by Lulu Hayness Kiwia (PW10) followed by a confirmatory test by Elias Mulima (PW5), a chemist at the office of the Chief Government Chemist in Dar es Salaam.

Only the appellant and a person known as Livingstone Bartholomeo Urasa were charged because according to the RCO Kilimanjaro who testified as PW7, Corporal Edward escaped from the police. Batholomeo

was alleged to be the man to whom the illicit drugs were destined, but at the end of the trial the court found him not guilty and acquitted him.

In defence, the appellant did not dispute the fact that he was found at the car by the road side, but maintained that he had nothing to do with it nor the parcels in it, which he was not even aware of. He gave an account of how he innocently got there. That he and his wife had attended a wedding ceremony of a friend at Himo area and when they were proceeding back to Moshi in a taxi, they saw the police vehicle by the road side and stopped to inquire what had gone wrong and if possible, assist. That is when PW6 and his men arrived and arrested them. He complained against the way he was tortured by the police and made to sign the certificate of seizure of the contraband he had no knowledge of.

Finally, the trial court got satisfied that the case had been proved against the appellant beyond reasonable doubt and convicted him of the charged offence. This appeal demonstrates the appellant's grievance with that decision.

There are three sets of memoranda of appeal. In the original memorandum of appeal the appellant raises nine complaints. In the first supplementary memorandum of appeal he raises seven grounds of

complaint while in the second supplementary memorandum of appeal there are five grounds.

When combined, those grounds of appeal raise the following issues:-

1. *Whether in fact there were drugs in the motor vehicle PT 2025 (Exhibit P6).*
2. *Whether the appellant was associated with and/or had control over that motor vehicle.*
3. *Whether the seizure certificate (Exh. P5) was legally prepared and signed.*
4. *Whether the inventory (Exh. P9) was properly prepared.*
5. *Whether the prosecution proved an unbroken chain of custody.*
6. *Whether the prosecution proved the case against the appellant beyond reasonable doubt.*

Ahead of the date of hearing, the appellant had presented written arguments to support the second supplementary memorandum of appeal, which he adopted. The appellant did not enjoy legal representation, but his oral address was methodical. The respondent Republic was represented by Mr. Innocent Njau, learned Senior State Attorney.

In order to unpack the issues smoothly, we begin with the fourth issue; whether the inventory was properly prepared.

The appellant faulted the inventory on three grounds, one being that he was not given a hearing before and after the disposal. Secondly, he argued that the prosecution should have tendered photographs of the alleged bhang, which they did not. He cited the PGO 229:25 and the case of **Mohamed Juma Mpakama v. Republic,** Criminal Appeal No. 387 of 2017 (unreported), where the Court discarded the inventory because the appellant was denied a hearing. He invited us to do the same. Thirdly, he attacked the disposal of the bhang for being done after a lapse of two years, and wondered why it took all that long. He cited the case of **Omary Said @ Athuman v. Republic,** Criminal Appeal No. 58 of 2022 (unreported) in which the Court considered 19 days as being too long a delay. He concluded by submitting that when the inventory is disregarded, the consequence is that the alleged drugs were not tendered in court.

Mr. Njau was, incidentally, in support of the appeal. He therefore joined in the attack, submitting that the delay in the preparation of the report by the office of the CGC was unexplained.

It is true that the alleged bags of bhang were not physically tendered in court during the trial. However, PGO 229:25 allows for disposal of certain types of items seized for exhibit before their being tendered in court. The evidence as to how the disposal of the alleged drugs was done in this case came from Aidan Henry Mwilapwa (PW8), a Resident Magistrate who was assigned to supervise the proceedings.

He testified that he went to the central police station where he was shown about 18 bags full of bhang but there were signs that rats had been gnawing them. He said that he ordered the bhang to be burnt and it was so burnt at Kaloleni Municipal dumping area in the presence of the two accused. He signed the inventory form which was tendered as Exhibit P9. Did PW8 deviate from the requirement of PGO 229.25?. The said PG0 provides:-

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard shall be brought before the Magistrate together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal, where possible such exhibits should be photographed before disposal."*

Unlike in the case of **Mohamed Juma Mpakama** (supra) where the suspect did not witness the disposal, in this case the appellant's own testimony proves the contrary. Part of his evidence runs:-

> *"Instead, I saw Ramadhani Ng'anzi giving instructions showing things which were many bags more than 30. Didn't get the exact number. We were taken by the car; the bags were taken into the lorry. We were taken to the dampo where the bags were destroyed by fire... didn't witness the bags being photographed."*

The appellant proceeded to testify that he refused to sign the inventory for the reason that he had nothing to do with the bhang.

We are resolved that the case of **Mohamed Juma Mpakama** (supra) is distinguishable and cannot apply to the circumstances of this case. In this case the appellant attended the disposal proceedings and his refusal to sign the inventory demonstrates the exercise of his right of hearing by questioning his involvement in the case. The absence of photographs would not vitiate the inventory, in our view, where the appellant confirms seeing bags of bhang being carried from the police to the dumping area where they were ultimately burnt.

We thus find Exhibit P9 credible and that it was properly prepared. We dismiss the grounds of appeal faulting it.

Next, we turn to the first issue, whether the bags of bhang were, in fact, found in the motor vehicle (Exhibit P6). Evidence on this fact came from PW2 and PW6.

The appellant invited us to find PW2 and PW6 as being unreliable witnesses because they led contradictory versions of what they witnessed at the scene. He drew our attention to some of those contradictions and Mr. Njau played into his hands. For instance, submitted the appellant, they had no common story as to which one searched the motor vehicle and which one prepared the certificate of seizure (exhibit P5). They also had no common version as to where exhibit P5 was prepared; was it at the scene as stated by PW2 or at Himo Police Station as stated by PW6. Mr. Njau supplied more nails to the coffin by showing that PW6's recollection of the type of bags containing the bhang was different from that of PW2 and also that of PW1.

Both the appellant and Mr. Njau faulted the finding of the learned SRM with extended jurisdiction treating those contradictions as minor. The appellant insisted that they went to the root of the case.

We are cognizant of the fact that the finding on the first issue which is very vital to this case, is wholly dependent on the testimonies of PW2 and PW6. Their credibility is therefore not a matter to be taken lightly. We take it to be settled that:-

> *"The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation to the evidence of other witnesses, including that of the accused person. In these two other occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

See the oft cited case of **Shaban Daud v. Republic,** Criminal Appeal No. 28 of 2001 as cited in the **Director of Public Prosecutions v. Simbo Mashauri,** Criminal Appeal No. 394 of 2017 (both unreported). We are, in this case, sitting on first appeal so we are even better placed to judge the credibility of PW2 and PW6 than if we had been sitting on second appeal. We are going to address the question whether the contradictions affected their credibility. Recently in the case of **Mychel Andriano Takahindengeng v. Republic,** Criminal Appeal No. 76 of 2020 (unreported), we had this to say: -

"In our re-evaluation of the evidence of PW5, PW6 and PW7, with the view of determining whether or not they are reliable, we are not oblivious to the fact of life that two or more people who witness an event, may not later tell it in exactly the same way."

We shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case **[Dickson Elia Nsamba Shapwata & Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported)]. And that minor contradictions are a healthy indication that the witnesses did not have a rehearsed script of what to testify in court. **[Onesmo Laurent @ Salikoki v. Republic,** Criminal Appeal No. 458 of 2018 (unreported)].

Now back to PW2 and PW6. They testified on 21/11/2017 and 23/11/2017 respectively over an emergence search and seizure that took place on 18/5/2013, over four years earlier. In our firm view, the human factor of loss of memory over that span cannot be overruled.

We know it is our responsibility to consider the point wholistically, taking into account all factors. We are, in the process, keenly aware of the fact that it is not a fiction that the police car (exhibit P6) was found by the road side during that night and that it attracted the curious attention of PW2 and PW6. Fortunately, this fact comes from PW2, PW6 and the appellant himself. We do not consider it probable that PW2 and PW6

would, in such unexpected circumstances, design a fictitious story of bhang being found in that motor vehicle, to implicate an unknown person. Evidence apart, this is a matter of common sense, and on that basis, we agree with the trial court that bhang was found in the car, exhibit P6.

Our next task is to consider if the appellant was associated with the motor vehicle that was found carrying bhang. The appellant's argument, citing the case of **Hamis Mbwana Suya v. Republic,** Criminal Appeal NO. 73 of 2016 (unreported), is that his admission that he was at the scene when the motor vehicle was found, does not mean he admitted being in its control. He has also questioned the prosecution's inability to call the transport officer responsible for assigning drivers and routes in relation to the motor vehicle (exhibit P6). He cited the case of **Pascal Mwinuka v. Republic,** Criminal Appeal No. 258 of 2019 (unreported).

As it were, Mr. Njau supported the appellant arguing that the judgment of the trial court was in violation of the principles provided under section 312(1) of the CPA, as it lacks findings of the court on material points.

It could be that the trial court was not quite meticulous in preparing its decision, but that does not justify Mr. Njau's prayer that we should

nullify it in exercise of our revisional powers vested under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E 2002 (the AJA). We are, it should be recalled, sitting on first appeal and conducting what is akin to a rehearing, at the end of which we are going to render our decision. It is therefore inconceivable that we should abdicate this duty and nullify the judgment. With respect, we decline that invitation.

There are basically two rival versions. One is by the prosecution that the appellant was associated with the motor vehicle carrying the contraband. The other is by the appellant that he was coincidently at the scene of the alleged crime, playing the role of a good Samaritan.

We can decide this point on the available evidence and we do not consider the omission to call the transport officer as so much of a dent. The appellant's argument demanding evidence of the transport officer assumes, in our view, that a person who acts on the wrong side of the law would necessarily do it lawfully by seeking approval or permission from the employer. It is normally quite the opposite.

The learned trial magistrate accepted the evidence of PW2 and PW6 as true, and we think he was entitled to that conclusion. First of all, there is no dispute that the appellant and Corporal Edward were arrested at the

scene and that both were police officers stationed in Arusha Region. Secondly, we take PW7's word that Corporal Edward subsequently escaped from police custody while being taken to Arusha to hand over office properties. The appellant's contention that he was coincidently with Corporal Edward at the scene is a fancy attempt by him to disgorge the impeccable story told by the prosecution. In the **Director of Public Prosecutions v. Justice Lumina Katiti & 3 Others,** Criminal Appeal No. 15 of 2018 (unreported) we refused to accept such suggested coincidences. We similarly do the same here. We appreciate the principle that mere presence at the scene does not mean one is an offender, but this case is not of that nature. We agree with the learned trial magistrate that the discrepancies in the testimonies of PW2 and PW6 are minor in the circumstances of this case where over four years had passed since they witnessed the event. In **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004 (unreported), the Court held in part that: *"...when a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies".*

Consequently, it is our finding that the prosecution proved through PW2 and PW6 that the appellant was associated with and had control of the motor vehicle, the carrier of the drugs.

We shall next consider the third and fifth issues, that is whether the seizure certificate (exhibit P5) was legally prepared and signed, and whether the prosecution proved an unbroken chain of custody.

In relation to these issues the appellant submitted that the certificate of seizure was not credible, citing several reasons: one, it does not state the place and time of signing, two, the appellant's signature was obtained through coercion, three, the witnesses who signed it did not testify, and lastly the police did not obtain approval of a magistrate as per the PGO and caselaw. He cited **Shaban Said Kindamba v. Republic,** Criminal Appeal No. 390 of 2019 (unreported) and **Pascal Mwinuka** (supra).

The certificate of seizure shows that it was issued under section 38(3) of the CPA but the reference to that provision may be inadvertent, in our view, because the evidence has established to our satisfaction that the search and seizure was an emergence one that would fall under section 42 of the CPA. The case of **Shaban Said Kindamba** (supra), is therefore distinguishable because in that case the police had prior knowledge of the existence of the bhang at the appellant's residence. It further shows that the search was conducted in the motor vehicle Reg. No. PT 2025 Toyota Land Cruiser the same version as given by PW2 and PW6 therefore the contention that it does not cite the place is not supported by the evidence.

On the whole we find the certificate of seizure credible as it was prepared according to the procedure.

On the chain of custody, the appellant submitted that there is no testimony as to who handed the alleged drugs to who. Mr. Njau supported this submission, adding that although chain of custody need not be proved by paper trail, in the circumstances of this case documentation was imperative.

We have held in quite a number of our decisions that chain of custody may be proved otherwise than through paper trail. See **Kadiria Kimaro v. Republic,** Criminal Appeal No. 301 of 2019 (unreported), and many others. Ours is not the only jurisdiction where chain of custody is a sore issue. In **The People of the Philippines v. Susan M. Tamano & Another** G. R. N. 208643, December 16, 2016, this problem was demonstrated by the following holding.

> *"However, while the procedure on the chain of custody should be perfect and unbroken, in reality, it is almost always impossible to obtain an unbroken chain. Thus, failure to strictly comply with Section 21(1), Article 11 of R.A. No. 9165 does not necessarily render an accused's arrest illegal or the items seized or confiscated from him inadmissible. The most important factor is the*

preservation of the integrity and evidentiary value of the seized item.

After considering all relevant factors, we are satisfied that although in this case there is no explanation for the in ordinate delay in preparing a report of the government chemist, we still hold a strong view that the integrity and evidential utility of the seized drugs remained intact. Accordingly, we dismiss the complaints on the certificate of seizure and chain of custody.

Given the position we have taken in resolving the preceding issues, the last complaint that the case was not proved against the appellant beyond reasonable doubt cannot stand. Mr. Njau submitted that the conviction cannot be sustained because the trial magistrate referred to a non-existent offence.

It is true that the magistrate found the appellant guilty and convicted him *"for trafficking and **possession** of narcotic drugs ...,"* but we consider it to have been inadvertent. This is because in sentencing the appellant, the learned magistrate was so clear on the offence which he had convicted the appellant of: -

"The law upon which the 1st accused person has been found guilty and convicted was trafficking narcotic drugs

c/s 16(1)(b) of the Drugs and Prevention of illicit traffic in drugs..."

So, we have no doubt that the appellant was rightly convicted of the offence with which he had been charged and the sentence imposed on him was the mandatory penalty for the offence.

This appeal is, for those reasons, dismissed in its entirety.

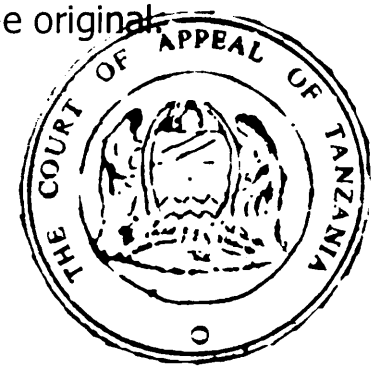
DATED at **MOSHI** this 6th day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 6th day of October, 2022 in the presence for the Appellant in person and Ms. Verediana Mlenza, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL