IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 383 OF 2021

ALLY HASSAN ABDALLAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kakolaki, J.)

Dated the 21st day of May, 2021

in

HC. Criminal Appeal No. 293 of 2020

.....

JUDGMENT OF THE COURT

21st September &24th October, 2022

KENTE, J.A.:

The appellant, Ally Hassan Abdalla appeared before the District Court of Kibaha where he was charged with the offence of trafficking in narcotic drugs contrary to section 15A (1) and 2 (c) of the Drugs Control and Enforcement Act, 2015. The particulars of the offence alleged that, on 25th February, 2020 at a place called "Mizani ya zamani" within the District of Kibaha, in the Coast Region, the appellant was found trafficking in 20.8 kilograms of drugs namely cannabis sativa or marijuana as it is otherwise commonly known. He was said to have been using a motorcycle make Boxer

with registration No. MC 170 CHE (Exh. P2). Despite refuting the accusations levelled against him, he was convicted and sentenced to thirty years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court, hence the present appeal.

A brief factual background of this appeal as can be gleaned from the records is not complex. Simply stated it goes as follows: At the material time, the appellant was riding a motor cycle along the Dar es Salaam-Morogoro road carrying two bags. He was coming from the direction of Morogoro towards the City of Dar es Salaam. When he came to the scene of the crime and as he tried to side step the road block, he was involved in a minor accident which caused some good samaritans to hurriedly go to his rescue. Among the persons who went to the appellant's aid is Corporal Osmund (PW2) a key prosecution witness. Upon getting close to the appellant who seemed not to have been seriously injured, PW2 discerned that the two bags on the appellant's motor cycle were loaded with some leaves which arose suspicion. According to PW2's version of the story, upon a careful examination, it became increasingly clear to him that the appellant was carrying marijuana. Accordingly, he seized the two bags and took them off together with the appellant to the Kibaha Central Police Station where

the rescue turned out to be an arrest of the appellant. The matter was then formerly reported to the police and thoroughly investigated.

During the trial, the appellant's defence version was totally of the prosecution's complete opposite. He denied to have been found while trafficking drugs. While conceding the fact that he was arrested at Mizani ya zamani area, he told the trial court that he was framed up following a row with the police who had simply accused him of insulting them and for his refusal to pay a fine which the police had imposed on him because of breach of some road traffic rules. As to the statement which he made to the police graphically admitting to have committed the offence, he told the trial court that he did not make any statement. The explanation of the appellant in relation to the said statement was very simple. He said that the police had forced him to sign a document which they had already prepared in advance the contents of which he couldn't know.

In view of the seriousness of the evidence led by the prosecution before the trial court, the learned judge of the first appellate court believed the prosecution evidence and concluded that, indeed the appellant's guilt had been proved beyond reasonable doubt as required by law. He

accordingly went on outrightly dismissing the appeal before him which challenged both the conviction and sentence.

In the memorandum of appeal to this Court, the appellant raised nine grounds of appeal which can however, conveniently be trimed down into the following seven grounds: -

(i) That the trial was conducted without the consent of the Director of Public Prosecutions contrary to section 12 (4) (sic) of the Economic and Organized Crimes Control Act. (hereinafter the EOCCA);

(ii) That, there being no search which was conducted, the certificate of seizure which was admitted in evidence was not valid;

(iii) That the learned judge of the first appellate court was wrong to uphold the appellant's conviction when the chain of custody of the alleged drugs was broken and questionable;

(iv) That the learned judge of the first appellate court was wrong for his failure to find that the appellant's cautioned statement (Exhibit P6) was illegally obtained;

(v) That, the first appellate judge was wrong for his failure to disregard the evidence of PW1 who was not recited as one of the

prosecution witnesses during the preliminary hearing, contrary to law;

(vi) That, the learned judge of the first appellate court should not have relied on the evidence of PW1 PW2, PW3, PW4, and PW6 which was concocted, collusive and unreliable; and

(vii) That the learned judge of the first appellate court was wrong for his failure to find that the prosecution had failed to prove its case to the required standard.

With regard to the first ground of complaint, the argument by the appellant appears to be anchored on section 12 (4) if not sub-section (3) of the EOCCA which provides, that:-

> *"The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence, be instituted in the Court."*

Submitting in support of the first ground, the appellant contended by way of his written submissions which he had filed earlier on in terms of rule 74(1) of the Tanzania Court of Appeal Rules, 2009 that, the trial by the District Court of Kibaha was a nullity because it was not preceded and supported by a certificate duly issued by the DPP transferring the case to the said court and therefore the trial magistrate had acted without the requisite jurisdiction.

Submitting in rebuttal, Ms. Fidesta Uiso learned State Attorney who was ably assisted by Ms. Elizabeth Olomi also learned State Attorney appearing for the respondent Republic was diametrically opposed to the appellant's position. She argued that, the provisions of section 12(4) of the EOCCA were not applicable in the circumstances of this case as the appellant was charged with a non-economic offence under section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, 2015 [Cap 95 R.E. 2019]. The learned State Attorney concluded that, the provisions of section 12(4) or (3) for that matter of the EOCCA which the appellant probably had in mind, were not applicable as the appellant was charged with an ordinary criminal offence which is triable by subordinate court.

In our settled view, we find that the appellant's complaint in the first ground of appeal has no legal basis. In terms of paragraph 23 of the First Schedule to the EOCCA, a person commits an economic offence under the said paragraph and by extension the EOCCA, if he commits an offence, under section 15, 16 or 23 of the Drugs Control and Enforcement Act. It cannot be doubted therefore that, having been charged under section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, the appellant was not faced with an economic offence for which the consent of the DPP would be required for him to be tried in a subordinate court as envisaged by section 12(3) of the EOCCA. We are satisfied in the circumstances that, there is no substantial cause justifying the complaint by the appellant that the trial court was not clothed with the requisite jurisdiction to try him. We thus dismiss the first ground of appeal for lack of merit.

In order to answer satisfactorily the question regarding the validity or otherwise of the certificate of seizure which was admitted in evidence as Exhibit P1 and is now being challenged in the 2nd ground of appeal, it will be convenient to sort of combine the second ground with the appellant's complaint in the third ground of appeal under which he is faulting the learned judge of the first appellate court for upholding his conviction by the trial

court while the chain of custody of the drugs forming the subject matter of the charge was broken and questionable.

With regard to the evidential validity or otherwise of the certificate of seizure, we must quickly observe that, this complaint was being raised for the first time. On the authority of **Bakari Abdalla Masudi v. Republic, Criminal Appeal No. 126 of 2017** (unreported), it is now settled law that, unless a ground is in relation to a point of law, the Court cannot entertain the ground of appeal which was not raised and subsequently determined by the first appellate court. We have no doubt whatsoever that, the question as to whether a search was conducted in this case is a matter of fact which we cannot entertain at this second appeal stage. Besides, the unexplained omission by the appellant to canvass this ground of appeal in his written submission is another factor which militates against his complaint. To us, this is an indication that he had abandoned it and, on that account, this observation disposes of the second ground of appeal which we hereby dismiss.

As to the appellant's further onslaught on the judgment of the first appellate, court, we start with an attempt to answer the question as to what in law, constitutes a chain of custody? It is generally agreed in legal contexts

that, a chain of custody is a process that tracks the movement of evidence through its collection, safeguarding and analysis lifecycle by documenting each person who handled the evidence, the date or time it was collected or transferred and the purpose for the transfer. In other words and that is what we said in **Paulo Maduka and Four Others v. Republic, Criminal Appeal No. 110 of 2017** (unreported) to which we were referred by the appellant, a chain of custody is the chronological documentation and/ or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic.

Regarding the purpose of recording the chain of custody, we went on to observe in the above-cited case that, it is to establish that the alleged evidence is in fact related to the alleged crime-rather than, for instance, having been planted fraudulently to make someone appear guilty. In practical terms therefore, a fullproof chain of custody requires that from the moment the exhibit is collected or seized from the custody or control of the suspect, its movement from one person to another or one place to another must be documented and that it must be capable of being proved that nobody else could have accessed or otherwise tempered with it. Given the above described position of the law, the pertinent question that follows is

whether or not, in the case now under scrutiny, the above-stated principle was followed throughout the investigation of the crime to the tendering in court of the disputed drugs.

In his submissions, the appellant did not only challenge the respondent for allegedly not observing the chain of custody to the letter, but he also complained that the 20.8kg of marijuana were fraudulently planted and that he was a victim of a frame-up. Elaborating, he said that otherwise, the police officers were bound to maintain a proper documentation on the search, seizure and movement of the drugs from the time of seizure from him up to the time when they were tendered as exhibit in court. The appellant complained that, there was no such documentation nor paper trail showing how the said drugs were moved from the place where he was arrested to the Kibaha Police Station and further that there was a contradiction between the evidence of PW1 and PW3 regarding the question as to whether PW1 had handed over the said drugs to PW3 on 25th or 26th February, 2020.

Capitalizing on the manner in which the name of Corporal Elias (PW1) was misspelled as Corporal Julius on 18/6/2020 when he appeared to testify but only the hearing to be adjourned after the appellant had informed the trial magistrate that his advocate was not in attendance, the appellant

contended that, the said Corporal Julius was not called as a witness and that there was nothing on the record showing that Corporal Julius was one and the same person as Corporal Elias. The appellant raised a similar complaint in respect of the evidence of Detective Corporal Ahmed Shomari (PW6). In support of this complaint he, submitted that, no explanation was offered as from whom did PW6 receive the disputed drugs which he subsequently handed over to Detective Corporal Yaresi (PW5) while PW3 who was the Exhibit-keeper had told the trial court that on 27th February, 2020, Detective Corporal Hemed collected the said drugs from her. The appellant's concern seems to be that the said Corporal Hemed (not Ahmed Shomari) was not called as witness thereby negatively impacting on the chain of custody which as a result, must have been broken somewhere.

Taking into consideration all the above stated circumstances, the appellant created his own theoretical premise that, there were two different criminal investigators of this case namely Detective Corporal Hemed who received the drugs from PW3 and Detective Corporal Ahmed Shomari who did not mention the name of the person from whom he had received the said drugs. The appellant believed that, the totality of what he considered to be a breakdown in the chain of custody rendered highly questionable the

report by a Government Analyst (Exh. PE5). With all this in mind, he complained that the first appellate court had erred in law in finding that on the evidence that was adduced before the trial court, there was an unbroken chain of custody of the disputed drugs.

Responding to the appellant's submission, Ms. Uiso strenuously contended that, the chain of custody remained intact from the date of seizure of the drugs up to when they were tendered as exhibit in court. She referred us to the testimony of PW2 who recounted how he handed over the said exhibit to PW1 who later on handed it over to PW3, the exhibit keeper. It should be recalled that it was PW2 who said that, he issued the said exhibit to PW6 who after having prepared it, he handed it over to Corporal Yares (PW5) who conveyed it to the Government Analyst (PW7) for analysis. For his part, it was PW7's telling that, after analysis, he sealed and returned the said exhibit to PW5 who took it back to PW3. As to what transpired thereafter, it was the testimony of PW3 that, being the custodian of exhibits, she kept it under her custody up to the time of its production in court. Given the above outlined chronology of events, the learned State Attorney was gladsome that the chain of custody had remained intact and explicable

throughout investigation up to the time the drugs were produced and admitted as exhibit in court.

Now, in determining the third ground of appeal, we take the liberty to restate the law that, where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence related to the alleged crime. (See **Paulo Maduka & Four Others v. Republic,** (supra) and **Anania Clavery Betela v. Republic**, Criminal Appeal No. 355 of 2017 (unreported). In the latter cited case, we made it clear that, the requirement to maintain a continuous chain of custody is not at the discretion of the police. It should be commonplace to the police officers that, when they investigate a crime, the guiding provisions controlling the chain of custody is their familiar Police General Orders (the PGO) No. 229 made by the Inspector General of Police pursuant to the powers conferred on him under section 7(2) of the, Police Force Auxiliary Service Act Chapter 322 of the laws. Therefore, following on heels is the question as to whether or not, in the instant case, the police officers who were involved in the investigation of this crime had observed the chain of custody as to make it unbroken and watertight.

As intimated before, whereas the appellant has complained that the chain of custody was not observed and that the alleged drugs were just planted to make him guilty in consequence of some misunderstandings with the police, Ms. Uiso has vigorously argued that the chain of custody was observed right from the time of seizure to the tendering and admission of the disputed drugs in court. The learned State Attorney was emphatic that the evidence led in support of the prosecution case shows that the chain of custody was not broken and if it was, she relied on our two decisions in the cases of **Abdallah Rajabu Mwalimu v. Republic,** Criminal Appeal No. 361 of 2017 and **Kadina Kimaro v. Republic,** Criminal Appeal No. 301 of 2017 (both unreported) in support of the position that, considering the particular circumstances of each case, oral evidence can also be relied upon to establish an unbroken chain of custody.

Before we pronounce ourselves on this particularly contentious issue, we wish to revisit albeit very briefly the chrolonical sequence of events culminating in the tendering of the disputed drugs in court. As stated earlier, the whole drama started with the appellant being involved in a minor traffic accident. PW2 who was among the persons who went to the appellant's rescue is recorded to have told the trial court that, after suspecting the

nature of the luggage which the appellant was carrying, he impounded it and issued him with a certificate of seizure (Exh P1). PW2 went on to say that, thereafter he took the appellant together with the suspicious cargo to the Police Station at Kibaha where he handed over the said cargo to PW1 the then Officer In Charge of the charge room office at Kibaha Central Police. The evidence on record shows that, PW1 kept the two bags of marijuana until the following morning when he handed them over to PW3 a police officer charged with keeping in safe custody all items due for exhibition in court. On her part, PW3 recounted that, after receiving the said items, she registered them in the exhibit register as required by law. She also told the trial court that on 27th February, 2020 Detective Corporal Hemed collected the said drugs from her and took them to the Government Chemist for analysis. She went on to say that, after analysis, the drugs were returned to her under seal on the same day. In support of what she stated in her oral testimony, she tendered the exhibit register (Exh. PE3), reflecting the receiving and issuance of the said items.

With regard to what transpired at the office of the Government Analyst, PW7's evidence was briefly to the effect that, he received the seized items from Detective Corporal Yares (PW5) and the said receiving was witnessed

by executing a sample receipt notification which was admitted in evidence as exhibit PE3. Thereafter, PW7 proceeded to the Laboratory where he opened the two bags in the presence of PW5 and after a careful analysis, he came out with the findings posted on a report which was admitted in evidence as exhibit PE5. He then closed and sealed the said items and the National Chemist Laboratory seal before he returned them to PW5 who in turn conveyed them back to PW3. The last witness to handle the said drugs was PW7 who after receiving them from PW3, he tendered them in court when he appeared to testify on 31st August 2020.

We have carefully considered all the above evidence as led from the prosecution side. We agree that, in any case of the present nature, evidence of an unbroken chain of custody must be available to avert the danger of planting evidence and frame ups. That cannot be gainsaid.

However, what we do not subscribe to in the instant case, is the contention by the appellant that the chain of custody was not observed in this case. With great respect, we think that the appellant's complaint was formulated from the immediate perception of things without regard to the evidence on the record. As a result, the said complaint cannot be explained on any other reasonable hypothesis than that it was an afterthought. We

take note of the fact that, when the documents evidencing the movement and transfer of the impugned exhibit from the custody of one officer to another or from one place to another were due for admission into evidence, the appellant did not raise any objection. It is also true and undisputed that, during cross-examination the appellant did not challenge the prosecution witnesses on the alleged planting of the evidence and the breakdown of the chain of custody.

Considering the evidence led by the prosecution as a whole, we are satisfied that the chain of custody was maintained throughout the investigation of this crime and it was subsequently proved before the trial court. The theory put up by the appellant that this crime was investigated by two different police officers who also handled the disputed exhibit but one of whom was not called as witness cannot be sustained in view of what has been discussed above. That said, we agree with the decision of the first appellate court that, the chain of custody remained intact and if it was broken because of the failure to record the movement of the drugs from PW2 to PW1 on 26th February, 2020 as alleged by the appellant, then on the authority of our decisions in **Sophia Seif Kingazi v. Republic,** Criminal Appeal No. 273 of 2016 and **Abas Kondo Gede v. Republic,** Criminal

Appeal No. 472 of 2017, (both unreported) the oral testimony of PW1 and PW2 which was not materially controverted is there to prove the fact that indeed on 26th February, 2020, PW2 had handed over the seized drugs to PW1. For the above stated reasons the appellant's complaint on the chain of custody would not succeed.

As regards the fourth ground of appeal in which the appellant is faulting the learned judge of the first appellate court for his alleged failure to find that his cautioned statement was obtained illegally, it was submitted that the said statement was recorded in total violation of section 50 of the Criminal Procedure Act, Chapter 20 R.E. 2019 (the CPA) which, among other things, requires a person taken under police restraint in respect of an offence to be interviewed within the period of four hours commencing at the time when he was taken under restraint. To put it differently, the appellant's complaint is that, his statement was recorded far beyond the prescribed four hours period. On the authority of **Janta Joseph Komba and three others v. Republic**, Criminal Appeal No. 95 of 2006 and **Salim Petro Ngalawa v. Republic,** Criminal Appeal No. 85 of 2004 (both unreported), it was the appellant's view that, having been recorded in contravention of section 50

of the CPA, the said statement ought to have been expunged from the record.

For our part, we could not understand the appellant's line of contention regarding his alleged cautioned statement. Whereas it is abundantly clear from his defence evidence that he denied to have ever made the said statement, it is equally clear from his written submissions in support of this appeal that, indeed he made a statement to the police but it was recorded after expiry of the four hours period contrary to the dictates of section 50 of the CPA. However, going by the evidence on the record, the complaint that, his statement was recorded out of the prescribed period is certainly untenable. In our view, the only possible inference to be drawn from the appellant's evidence is that, by way of an afterthought, he was seeking to repudiate his statement by denying to have ever made it.

In these circumstances, it occurs to us that, the appellant is clearly riding two horses at the same time by contending on one hand that, he never made any statement to the police while on another hand he is saying that his cautioned statement was recorded but in contravention of the mandatory requirements of the law. Needless to say, the two situations put forward by the appellants are strange bedfellows as they are at odds with one another.

But as the adage goes, nothing is so wasteful as burning fuel in order to heat the outside air. If the appellant never made the said statement to the police, he would not have instructed the draftsman of his written submissions to waste time and energy to argue that section 50 of the CPA was violated during the recording of his statement. It follows in our judgment that, in fact the appellant did make the said statement which he is now challenging on the ground that it was recorded contrary to section 50 of the CPA. To leave no stone unturned, the appellant's complaint must lead us to the examination of the time within which his statement was recorded.

The argument by the appellant was that, the impugned cautioned statement was recorded beyond the four hours period after his arrest. It was pointed out that, whereas he was arrested on 25th February, 2020 at 2:30 midnight (sic), his statement was recorded on the following day at 8:00am which was beyond the prescribed period of four hours following his arrest.

With due respect to the appellant, that is not and cannot be true. The evidence of his arrest is found in the testimony of PW1 who told the trial court that the appellant was formerly arrested on 26th February, 2020 at 4:00am and his statement was recorded on the same day starting from

8:00am. It is wrong therefore in the circumstances, for the appellant to say, that his statement was recorded in violation of section 50 of the CPA. As everyone might expect, we reckon the four hours period from 4.00 am when the appellant was formerly taken into restraint ending at 8:00am when the recording of his statement begun.

If we accept the unchallenged evidence of PW1, which we do, then we must find that the appellant's caution statement was recorded within four hours of his arrest. We therefore reject his complaint and hold that the said statement was recorded in accordance with the requirements of the law. Ground four of the appeal is therefore dismissed.

Turning to the fifth ground of appeal under which the appellant attacked the reliability of the evidence of PW1 pointing out that he was not enlisted as one of the prosecution witnesses during the preliminary hearing, in view of what we have already stated to the effect that there is nothing on the record suggesting that there were two investigators of this crime, we shall deal with this ground summarily. Based on the above-stated premise, we would conclude that there appears to be nothing from the record to support the appellant's complaint which we hereby dismiss.

We finally come to the sixth and seventh grounds of appeal which we wish to consider conjointly. To recapitulate, whereas the appellant's complaint in the sixth ground is that the first appellate court was wrong to rely on the concocted, collusive and unreliable evidence of PW1, PW2, PW3, PW4, and PW6, under the seventh ground, the appellant is complaining that, all things considered, the charge again at him was not proved to the required standard to warrant a conviction. Having considered the flimsy arguments advanced by the appellant in a bid to substantiate his claims, and, upon combing through the impugned evidence of the five prosecution witnesses, we have found nothing suggesting that their evidence which was not materially controverted could have been fabricated or can be said that the five witnesses had acted in collusion to incriminate the appellant.

As can be gleaned from their respective testimonies, the five witnesses gave a credible account of what they witnessed and did in connection with the charged offence. The evidence in this case including the appellant's own confessional statement which he made to the police graphically implicating himself, did not reveal any possibility of a concoction and collusion among the prosecution witnesses contrary to the appellant's complaint. In the circumstances, the learned judge of the first appellate court cannot be

faulted for according weight which was due to the evidence of the said witnesses. Once the learned judge rejected the appellant's explanation of the events culminating into his trial and conviction by the trial court, the grounds of appeal put forward by him could not succeed. Clearly, they were doomed to fail.

In the final analysis therefore, we find no merit in this appeal which we hereby dismiss it in its entirety.

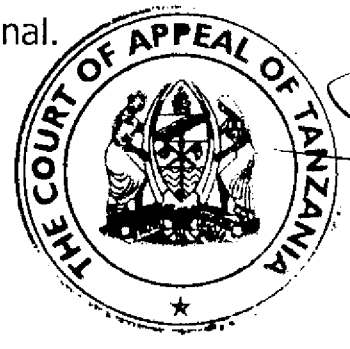
DATED at **DAR ES SALAAM** this 19th day of October, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P.M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered on this 24th day of October, 2022 in the presence of appellant in person and Ms. Elizabeth Olomi, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL