IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 476 OF 2019

WAZIRI SHABANI MIZOGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mambi, J.)

Dated the 29th day of September, 2019

in

Criminal Sessions Case No. 66 of 2015

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JUDGMENT OF THE COURT

30th September 2022 & 16th June, 2023

KOROSSO, J.A.:

The appeal before us derives from the decision of the High Court of Tanzania sitting at Mbeya in Criminal Session Case No. 66 of 2015 where the appellant, Waziri Shabani Mizogi (the accused then) faced a charge with two counts. In the first count, Trafficking in Narcotic Drugs, contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 R.E. 2002] as amended by section 31 of the Written Laws (Miscellaneous Amendments) Act, No. 6 of 2012 (the Act). Allegedly, on 4/5/2012 in Tunduma Township within Momba District in Mbeya

Region, the appellant did traffic in narcotic drugs, to wit, a mixture of heroin hydrochloride and cocaine hydrochloride weighing 547.21 grams valued at Tshs. 24,624,450/=. The second count being Trafficking in narcotic drugs contrary to section 16(1)(b) of the Act, the particulars were that on the same date and location as in the first count, the appellant did Traffic in narcotic drugs, heroin hydrochloride (diacetylmorphine hydrochloride) weighing 1465.87 grams worth Tshs. 65,964,150/=. The appellant was convicted on both counts and sentenced to twenty (20) years imprisonment plus a fine of ten million shillings for each of the counts. It was further ordered that the sentences of imprisonment run concurrently.

The facts of the case giving rise to the present appeal as gathered from the record of appeal are that on 3/5/2012, the appellant together with three persons who are not parties to the instant appeal; Santos, Kelvin and Matheu John Vicent, a Mozambican by nationality, traveled from Dar es Salaam to Tunduma, enroute to Zambia. At Tunduma, the appellant checked in and registered at Nice Sheriz Guest Hotel (the guest hotel) and was allocated "Kinshasa Room."

The evidence on record shows that on 4/5/2012, immigration officers at Tunduma border received information from an informer that

there were persons from Dar es Salaam who had narcotic drugs. The said information was reported to the Tunduma Police. Subsequently, a joint team of immigration and police officers Ephraim William Mgandu, Felix Hassan Mika (PW3), Abubakari Athumani, E. 46 D/Cpl. Faustine and WP Esther J. Kamunyoge (PW7) initiated a patrolling exercise around Tunduma border area to trace the alleged culprits. In the process, the patrol team met a person who identified himself as Matheu John Vicent and queried him about possession of narcotic drugs, which he denied but advised the team to search the appellant who was staying at the guest hotel in Kinshasa room.

The patrol team went to the guest hotel and were received by Yunis Simkonda, the guest hotel attendant. Yunis Simkonda's statement was admitted as exhibit P15. Upon being briefed on the purpose of the visit, Yunis Simkonda proceeded to show them the room (Kinshasa room) where the appellant had spent the night. The appellant was inside the room at the time. On meeting the patrol team and being told who they were and their reasons for being there, the appellant was then questioned, and his room was searched. The search led to the seizing of two bags, a large gold-coloured bag and a black briefcase.

Thereafter, the appellant and the seized bags were taken to the Immigration Office Tunduma for further interrogation and inspection of

the seized two bags. Yunis Simkonda was asked to tag along. At the Immigration offices Tunduma, the appellant was further questioned about the contents of the seized bags and his reasons for being in Tunduma. While the questions ensued, PF15569 Francis Mboya (PW2), the In-charge of the Drug Unit Mbeya zone arrived to join the team interrogating the appellant. It was during the appellant's interrogation, that he stood up, grabbed the gold-coloured bag, and holding it, ran away toward the Zambian side of the border to escape. The appellant's escape venture was stopped by the interrogating officers with the help of civilians who chased and apprehended him and took him back to the Immigration office. To be noted is the fact that, Matheu John Vicent, who was also being questioned at the time, used the appellant's escape fracas to escape. He was never re-arrested although he left behind his Mozambican passport No. AF004528.

While the interrogations of the appellant proceeded, PW2 prepared a search order, and the search of the seized bags led to the retrieval of several items including; four parcels which were later marked "A" to "D" (exhibit P7), one parcel "E" (exhibit P8) and three parcels marked "F" to "H" (exhibit P9). According to PW2, in the large gold-coloured bag, apart from the clothes and other personal items found, eight packets containing brown flour substance wrapped in nylon and sealed with cello tape and

glue were also retrieved from the inside the case walls. Similarly, inside the covers and walls of the black briefcase, four coffee-smelling packets wrapped in black nylon and cello tape, and glue were retrieved. A passport with the appellant's name and photograph (exhibit P1) was also retrieved from therein. The certificate of seizure (exhibit P10) was prepared and the contents of what was retrieved from the two bags were recorded and witnessed by the appellant, Yunis Simkonda, and other officers present. PW2 testified that the appellant, Yunis Simkonda, and some of the officers there signed the certificate of seizure to signify having witnessed the seizing of the narrated items from the two cases belonging to the appellant.

Thereafter, PW2 then labeled the seized packets and handed them to F. 679 D/Sgt Daniel (PW4), RCO Tunduma exhibit keeper for storage. The exhibits were on 6/5/2012 taken to Government Analyst Laboratory in Dar es Salaam for Analysis, where it was determined that they were narcotic drugs. This led to the arraignment of the appellant before the trial court as per the charge sheet. The appellant's defence was in essence that of denial of the charge against him. He, however, conceded that on 4/5/2012, he was at Tunduma border at the Nice Sheriz Hotel where he checked in on 3/5/2012 upon arrival from Dar es Salaam. He testified that he had met and chatted with Matheu Vicent on the bus he traveled in

from Dar es Salaam. The appellant narrated the circumstances of his arrest on 4/5/1012 at 11.00 hours, while in his room at the guest hotel and the search conducted in his room by the arresting officers despite his denial of having narcotic drugs. He stated that he only had a briefcase which had nothing and denied possessing the bags seized, stating that they belonged to Matheus Vicent who was never arrested or charged.

After hearing and having considered the evidence from the prosecution and defence sides and satisfied that the prosecution side had proven the charge against the appellant beyond reasonable doubt in both counts, the trial Judge convicted the appellant and sentenced him accordingly as shown herein above.

Aggrieved by the trial outcome, the appellant lodged a memorandum of appeal with six grounds of appeal that fall mainly into the following four grievances that fault the trial court as follows: **One**, failure of the prosecution side to prove the case against the appellant beyond reasonable doubt. **Two**, failure of the prosecution to prove the sanctity of the chain of custody of the seized exhibits alleged to contain narcotic drugs as charged. **Three**, failure to properly analyze the evidence of prosecution witnesses, considering extraneous matters not supported by adduced evidence and disregarding palpable contradictions in the prosecution evidence; and **four**, improper invocation of the doctrine of

recent possession and conviction of the appellant based on the weakness of his defence.

When the appeal was called for hearing, we commenced by discharging Mr. Isaya Mwanri, learned Advocate, from representing the appellant upon granting his unopposed prayer. Thereafter, the appellant's prayer to proceed with the conduct of his case, unrepresented, was granted by the Court. Ms. Prosista Paul and Mr. Joseph Mwakasege, learned State Attorneys, entered appearance for the respondent Republic.

Upon being given the opportunity to submit his appeal, the appellant adopted his grounds of appeal and written submissions and prayed for us to consider them and for his appeal to be allowed. He urged us to allow the learned State Attorney to respond to his appeal first whilst he retains the right to rejoin thereafter if the need arises.

In his oral and written submissions, the appellant submitted his grounds of appeal generally. His starting point was expounding the duty of the first appellate court to analyze and re-evaluate afresh the evidence presented at a trial. He cited the case of **Mohamed Musero v. Republic** [1993] T.L.R. 290 to reinforce the position. In amplifying grievance one, the appellant faulted the trial court for convicting him despite the failure of the prosecution side to prove the charge against him beyond

reasonable doubt, contrary to the settled position of the law on the prosecution side's onus of proof in criminal cases reiterated in cases such as **Nkanga Daudi Nkanga v. Republic**, Criminal Appeal No. 316 of 2013 (unreported).

The appellant implored us to determine that the evidence to prove the offence charged was engrained in the following gaps that remain unresolved and thus raised doubts on the prosecution case: One, failure of the prosecution to present direct evidence to prove the charge against the appellant. He argued that there was no direct evidence presented by the prosecution side and their reliance on weak circumstantial evidence fell short of the threshold required in proving criminal charges. He argued that the presented circumstantial evidence was insufficient and fell short of the underlying principles governing when to rely on circumstantial evidence as held in such cases as **Republic v. Kipkering Arap Koske and Another** (1949) 16 EACA 135, **Abdul Mganyinzi v. Republic** (1980) 263 and **Elias Paul v. Republic**, Criminal Appeal No. 7 of 2003 (unreported). The appellant questioned the failure of the prosecution to call important witnesses to testify, such as the alleged informer without assigning any reasons for such failure and thus urged the Court to draw an adverse inference on the prosecution. Two, failure of the prosecution side to explain where the seized exhibits were stored after being seized

on 4/05/2012 up to the time they were seen at RCO's office in Mbeya on 5/5/2012. Three, the propriety of his arrest contending that it was in contravention of section 41 of the Criminal Procedure Act, Cap 20 (the CPA) since he was not promptly arrested, nor the alleged bags promptly seized after he was apprehended in his room. He argued that the delay to arrest him and seize the bags raise doubts on whether at the time of his arrest and seizure of the alleged bags, the arresting officers had the information on there being persons suspected of trafficking in narcotic drugs. The appellant further contended that the said infraction is further amplified when considered together with the failure of the prosecution to call to testify two police officers who were in the team that arrested him, that is, E. 46 D/Cpl. Faustine and WP Esther. The appellant thus argued that under the circumstances the presented circumstances were such that no inference can be drawn of him being guilty of the charges he faced. He thus prayed that we find that the charge against him was not proven.

On the second grievance, the appellant contended that the chain of custody of the exhibits tendered by the prosecution to prove the charge against him was broken and thus vindicating the said exhibits, and cited the case of **Paulo Maduka v. Republic**, Criminal Appeal No. 110 of 2007 and **Chacha Jeremiah Murimi and 3 Others v. Republic**, Criminal Appeal No. 551 of 2015 (both unreported) to reinforce his stand.

According to the appellant, exhibits P8 and P9, the alleged narcotic drugs having been tendered by PW1, do not clearly show the sanctity of its chain of custody. He argued that having been seized in Tunduma around 14.00 hours as per exhibit P10, and according to PW4 received them on 5/5/2012 at 15.00hours, a day after being seized without an explanation on where they were stored upon being seized, or how the seized exhibits were transported from Immigration office to the RCO office where PW4 received them. He also questioned the fact that despite the evidence of PW2 that the exhibits were handed to Inspector Masanja at Tunduma border in writing, no such record was produced in court nor was Inspector Masanja called as a witness.

The other concern raised is the propriety of the seizure certificate. The appellant contended that in the instant case, there was no independent witness procured to testify about witnessing the seizure of the narcotic drugs. He contended that the prosecution relied on the statement of Yunis only tendered by PW7, while the said Yunis did not sign anywhere in the seizure certificate to signify having witnessed the exercise of seizing the narcotic drugs as alleged. The Court was referred to its decision in **David Athanas @ Makasi and Another v. Republic,** Criminal Appeal No. 168 of 2017 (unreported) which discussed a similar scenario, he argued.

Regarding grievance three, on the failure of the trial court to properly analyze evidence and relying on extraneous matters not adduced in evidence, the appellant stated that in the trial court's judgment on page 7, when reproducing the evidence of witnesses, there was evidence that it considered which was not adduced in the trial court. He argued PW2 did not testify to have found the passport with the name and photo of Waziri Shaban in the bags that had narcotic drugs packets and that PW2 had only stated that the passport was in the appellant's possession. On the issue of the appellant's attempt to escape by running away, the appellant contended that what is found in the Judgment of the trial court on page 30 is incorrect since there is nowhere PW2 and PW3 stated having received a phone call to inform them that the appellant was arrested.

Regarding the fourth grievance, the appellant highlighted what he contended are contradictions in the prosecution evidence. His concern was on the fact that whilst PW2, PW3, and PW7 stated it was the appellant who opened the bags, Yunis stated it was one William Mgando who opened the bags. The appellant contended that this showed inconsistency in the testimonies of prosecution witnesses. He urged us to find the evidence to lack credence. He concluded by imploring us to allow the appeal and set him free.

Ms. Paul's response commenced by first establishing the fact that the respondent Republic was resisting the appeal. Regarding the first grievance, she contended that the prosecution proved its case against the appellant beyond reasonable doubt through the eight witnesses who testified, and the exhibits tendered and admitted into evidence. The learned State Attorney contended that the evidence adduced to prove each ingredient of the offences charged was amply corroborated. She argued that PW1's evidence related to having analyzed and determined exhibits P8 and P9 alleged to have been seized from the appellant to be narcotic drugs augured well with the evidence found in exhibit P10, the certificate of seizure on what was seized and the evidence of PW2 who was amongst those who seized exhibits P7, P8 and P9. She argued that there was also evidence of PW4 who stored the said exhibits after being handed by PW2 and was the custodian of the said exhibits throughout up to the time they were tendered at the trial.

The learned State Attorney urged us to find that the evidence of PW3 corroborated the evidence of PW2 on the transfer of the exhibits from the point of seizure to the RCO's office, taking them for analysis and storage by PW4. She argued that the evidence of PW3 corroborated the evidence on the seizure of the said exhibits and the arrest of the appellant at the guest hotel. Ms. Paul argued that apart from PW2 and PW3's

evidence on the seizure of exhibits P7, P8 and P9 there was also evidence of the guest hotel attendant on the seizing of the exhibits and arrest of the appellant. She thus urged us to find evidence to prove the charge was watertight and to the standard required.

On the sanctity or otherwise of the chain of custody of exhibits P7, P8 and P9, the learned State Attorney maintained that the prosecution evidence established that from the seizure of the exhibits when sent for analysis to when tendered and admitted in court, there was no room for interference. She argued that at the time when the exhibits were seized, a certificate of seizure prepared by PW2 and then signed by the appellant, the hotel attendant, Yunis, and the seizing officer shows the items seized from suitcases belonging to the appellant, found in a guest hotel room, which the appellant had registered in.

The learned State Attorney contended further that thereafter the seized exhibits were stored by PW4 and taken for analysis by PW4 and PW2, with the analysis done by PW1 who also tendered them in court. She argued that the handover of the said exhibits at each stage was by way of tendered exhibits and oral evidence, including exhibits P10 and the analysis report (exhibit P5) and testimonies of witnesses, PW1, PW2, PW3 and PW4. She asserted that the evidence presented revealed the handover of the seized exhibits to PW1, the labeling of the exhibits by

PW2, PW4, and PW1 to ensure that the record of movement, storage, and handover of the exhibits is there.

The learned State Attorney implored us to consider the circumstances in this case and rely upon the decisions of this Court in the case of **Kadiria Saidi Kimaro v. Republic,** Criminal Appeal No. 301 of 2017 (unreported) on pages 10 and 11 and **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) and find that there was no space in the chain from the time of the seizure of the exhibits to compromise them. She further implored us to consider the fact that the trial court found PW1-PW4 to be credible witnesses. She urged us to find that the prosecution side managed to prove the fact that the chain of custody of exhibits P7, P8 and P9 was not compromised from seizure to being admitted in court and thus the second grievance should be found to be unmerited.

Ms. Paul further urged us to consider the fact that the appellant's evidence somewhat supported the prosecution's evidence on the seizure of the exhibits since the appellant did not dispute the fact that the two bags found in his room were found to have substances later determined to be narcotic drugs but what he challenged was that the two bags do not belong to him but belonged to one Matheu Vicent who disappeared on the day of the seizure of the exhibits and his arrest. The learned State

Attorney further argued that even if the seized bags were Matheu Vicent's, the fact that they were found in the appellant's room warranted the trial court to apply the principle of constructive possession against the appellant under the circumstances.

With respect to the third grievance on alleged discrepancies in the prosecution evidence regarding the date PW4 received the exhibits and when they were sent to the Government Chemist Laboratory office for analysis in the absence of any register book to bring clarity, Ms. Paul beseeched us to ignore the complaint since it lacked substance. She argued that a proper evaluation of the evidence as already expounded should result in only one conclusion that there was no contradiction in the evidence adduced that relates to the dates of receiving evidence and handing over for analysis by PW4. The learned State Attorney maintained that PW4's evidence was that he received the exhibits on 5/5/2012 (see pg. 116 and 104) and not otherwise, therefore there was no ambiguity on this issue. She thus urged us to dismiss the grievance being devoid of merit.

Responding to the fourth grievance challenging the trial court for considering extraneous factors, the learned State Attorney dismissed the appellant's allegations arguing that the record of appeal does not show this and that the evidence from prosecution witnesses was that the

appellant's passport was retrieved from his bags during the search upon being seized as reflected in the judgment of the trial court. She argued that even if it were as alleged, the seizure of the passport was not a disputed issue, and thus the trial court's finding did not prejudice the appellant.

The learned State Attorney conceded to the complaints that the trial court improperly invoked the principle of recent possession when determining the charges against the appellant. She, however, was quick to state that taking into consideration what was before the court, the infraction did not prejudice the rights of the appellant. On the complaint that the defence evidence was not considered, Ms. Paul contended that, as can be discerned from the record of appeal, the trial court did consider the appellant's evidence in defence but rejected it, finding it unmerited.

The learned State Attorney concluded by imploring us to find that the prosecution side had fulfilled its burden and proved the case against the appellant beyond reasonable doubt and dismiss the appeal as being unmerited.

The appellant's rejoinder was brief. He reiterated his argument that the bags alleged to have been found in his room and seized did not belong

to him and that at no time did he try to escape after being arrested. He then prayed for his appeal to be allowed.

On our part, having carefully examined the record of appeal and the submissions both written and oral from the contending sides, in the determination of the appeal, we shall delve into the first grievance conjointly with the second, third, and fourth grievances and conclude with the issue of the propriety of the sentence. The essence of this appeal is whether the prosecution obliged its burden of proving the charge against the appellant beyond reasonable doubt.

Suffice it to say, there are facts that we find not disputed by the parties. One, is that the appellant and his colleagues who are not part of this appeal traveled from Dar es Salaam to Tunduma on 3/5/2012 and checked in at Nice Sheriz Hotel, Tunduma up to the time of his arrest on 4/5/2012. Two, at the time of his arrest, the appellant was in possession of his Tanzanian passport No. AB415316.

In the present appeal, the appellant's charge is that of Trafficking in Narcotic Drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act which allegedly occurred on 3/5/2012. Trafficking is defined under section 2 of the Drugs Act as:

> "*the importation, exportation, buying, sale, giving, supplying, storing, possession, production,*

manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance..."

Undoubtedly, in the above definition, possession is a component of trafficking. In the instant case, as correctly argued by the learned State Attorney, the evidence of PW2 and PW3 shows that the appellant was found with two bags in a room at the guest hotel in Tunduma. This evidence is also supported by exhibit P10 which was signed by PW2 and the appellant himself on the contents seized in Kinshasa room of the guest hotel. According to PW1 upon analysis of exhibit P8, she confirmed it contained a mixture of heroin hydrochloride and cocaine hydrochloride and exhibit P9 contained heroin hydrochloride. Section 2 of the Act states that any substance specified or anything that contains any substance specified in that First Schedule to the Act, is a narcotic drug. Cocaine and heroin are listed therein and thus are narcotic drugs.

The appellant has challenged his conviction contending that the prosecution failed to prove its case against him. He faulted the High Court's evaluation of the evidence arguing that there were gaps in the evidence adduced by the prosecution, which had they been properly evaluated by the trial court should have benefitted the appellant. Having

scrutinized the record of appeal, we find that from the time he was arrested in his room at the guest hotel, taken to immigration offices, interrogated, and searched, it was within the confines of the arresting procedures and there was no contravention of section 41 of the Criminal Procedure Act, Cap 20 (the CPA) as advanced by the appellant. According to PW2, a search order was issued, and the appellant was duly informed of the reasons for the investigating team to enter his room and conduct a search. The fact that he was moved from the guest hotel, a business premise to go to the immigration office for further investigations we find did not in any way prejudice his rights and he himself has not advanced any infringement of his rights. We find this complaint to be an afterthought.

The appellant also faulted the prosecution's evidence related to him being found with the two bags containing narcotic drugs arguing that the prosecution side failed to prove that the said bags were seized at his hotel room and that the seized bags belonged to Matheu Vicent who had disappeared. The appellant has also queried the veracity of the evidence by PW2, PW3 and PW4, arguing that it was contradictory and inconsistent and urged us to find it unreliable.

It is on record that upon evaluation of evidence, the High Court determined in the affirmative the first issue it framed of whether the prosecution proved the case against the appellant beyond reasonable doubt finding that the prosecution had watertight evidence and concluded by convicting the appellant. The trial Judge found PW2 to be an eyewitness, since he was the officer who arrested the appellant, and seized the two bags with the narcotic drugs. On the complaint on the inconsistency of the evidence of PW2 and PW3 on the attempted escape venture by the appellant, the trial Judge observed that the fact that PW2 and PW3 testified on witnessing the appellant's attempt to escape while holding one of the bags removed any doubt that he was found in possession of the bags that had narcotic drugs. On the reliability of PW2 and PW3, the High Court Judge held:

> *"... I am of the considered view that PW2 and PW3 were not only reliable witnesses but also witnesses of truth and their evidence clearly showed that the accused person had a hand in the offences he stands charged..."*

The High Court Judge also found the evidence of PW2 and PW3 corroborated by that of PW1 who had analyzed the contents of exhibits P7, P8 and P9 found in the seized two bags and determined that while

exhibit P7 had no narcotic drugs, exhibits P8 and P9 were narcotic drugs. Certainly, having revisited the record of appeal, we are constrained to agree with the trial Judge's finding on the credibility of the evidence of PW2 and PW3, having nothing before us to find otherwise.

Similarly, having reassessed the evidence on record, particularly, that of PW2 and PW3 and exhibits P10 and P15, we are inclined to agree with the trial Judge that the evidence showing that the two bags that contained exhibits P8 and P9 were indeed seized from the appellant's room at the guest hotel in his presence is watertight. PW2 and PW3's evidence together with exhibits P10 and P15, the statement of Yunus Simkonda, admitted under section 38B of the Evidence Act without an objection from the defence counsel supports the finding. In her statement, Yunus Simkonda narrates of having witnessed the patrol team finding the appellant in his room at the guest hotel, the two bags were found in the appellant's room, a gold-coloured bag and a briefcase and the fact that the bags were taken by officers who included PW2 together with the appellant.

Other relevant evidence is that of PW2 who stated that when the two bags were seized, they were locked, and the appellant assisted to unlock them by inserting passwords or pin numbers. PW2 and PW3 and exhibits P10 and P15 showed that it was during the search of the two

bags that packets were retrieved from the inside pockets of the bags and upon analysis by a competent authority determined to have narcotic drugs as per the evidence of PW1 and exhibit P5. We have also failed to find any contradictions in the evidence related to the appellant's attempt to escape when he was being questioned at Tunduma Immigration office.

Even if for the sake of argument, the appellant's contention that the bags found in his room did not belong to him was to be considered, we agree with the learned State Attorney that, in this case, the principle of constructive possession of the two bags may be invoked against the appellant. In the case of **Moses Charles Deo v. Republic** [1987] T.L.R 134, the Court had the opportunity to expound on the principle of constructive possession and stated:

> *"... for a person to be found to have had possession, actual or constructive, of goods it must be proven either that he was aware of their presence and that he exercised some control over them, or that the goods came, albeit in his absence, at his invitation and arrangement."*

The evidence shown above clearly establishes that the two bags containing narcotic drugs were seized from the appellant's room at the guest hotel while he was also inside it. We find that the above circumstances fall squarely into constructive possession on the part of the

appellant. (See also **Emmanuel Mwaluko Kanyusi and 4 Others v. Republic**, Consolidated Appeals No. 110 of 2019 and 553 of 2020 (unreported). We thus find the complaint to lack substance.

On the complaint of there being extraneous matters in the Judgment of the High Court, as argued by the learned State Attorney this complaint is misconceived since there was no new element introduced by the trial court when analyzing the evidence for the prosecution. All situations expounded by the appellant arise from misconstruing the evidence of the complained witnesses and thus being misconceived.

With respect to the complaint on the prosecution side's failure to call some witnesses to testify including the informer, two police officers, E46 D/Cpl. Faustine and WP Esther who were part of the arresting team, suffice it to say that section 143 of the Evidence Act stipulates that there is no particular number of witnesses required to prove a fact as discussed in the case of **Yohannis Msigwa v. Republic** [1990] T.L.R 148. Similarly, we are alive to the settled position of the law that requires the prosecution to call material witness(s) to prove the case against an accused person, failure to which, without sufficient reason may lead the court to draw an adverse inference as stated in the case of **Azizi Abdallah v. Republic** [1991] T.L.R 71. Having considered the circumstances of this case, we agree with the learned State Attorney's

argument that the instant appeal did not necessitate the calling of the alleged informer and the named police officers in view of the fact that the adduced evidence before the trial court on the arrest of the appellant and seizure of the packets containing narcotic drugs which the appellant is charged against was sufficient to prove the arrest of the appellant and the seizing of the alleged narcotic drugs. Therefore, the complaint is unmerited.

The appellant's other complaint is that his conviction was based on the weakness of his defence and not the strength of the prosecution evidence. The learned State Attorney implored us to find this complaint to be misconceived since when convicting the appellant for the offence charged, the Court considered the strength of the prosecution case and not otherwise. Having revisited the record of appeal, we are inclined to agree with the learned State Attorney's summation. This is because, in the judgment at page 267 of the record of appeal, the High Court Judge states:

> *"...I will commence with the first and key issue that is whether the prosecution has proved the case against the accused beyond reasonable doubt."*

Certainly, the trial judge properly directed himself by reminding himself that in criminal cases the burden of proof rests on the prosecution and went on to seek whether the prosecution did prove the charge against the appellant. It was the trial court's finding that the defence evidence was engrained in lies, however, at each stage in his deliberation on the evidence before the court, the trial Judge kept warning himself of where the onus of proof lies and held that the evidence by the prosecution witnesses was watertight, and the charge against the appellant proved. In the circumstances, we are constrained to hold that the record clearly shows that the conviction of the appellant was not based on the weakness of the defence but it was upon the trial court being satisfied on the strength of the prosecution evidence in proving the charge against the appellant. Therefore this complaint lacks merit.

The other grievance relates to the sanctity of the chain of custody of exhibits P7, P8 and P9. The appellant queried the propriety of the storage of exhibits P7, P8 and P9 upon being seized, stating that the prosecution failed to explain the gap from the time of the seizure of the bags to when PW4 received them on 5/5/2012 at 15.00 hours, a day after being seized. He complained about the absence of documentary evidence to show the transfer of exhibits from one person to the other who had custody of the said exhibits at any particular time and the absence of any

information related to the transportation of the exhibit from the place of seizure to RCO's office. The appellant also questioned the failure of the prosecution to call Inspector Masanja to testify on his role in the storage of the exhibits and thus prayed for us to find that the chain of custody was compromised. The learned State Attorney on the other hand urged us to find that the chain of custody was intact and that the prosecution evidence had established that fact.

The Court has through various decisions set in place guidelines and conditions to determine the sanctity of the chain of custody of exhibits. Some of these decisions were cited by both sides of this appeal and we appreciate it. In cases including **Paulo Maduka and 3 Others v. Republic**, Criminal Appeal, No. 110 of 2007, **Zainab Nassor @ Zena v. Republic**, Criminal Appeal No. 348 of 2015, **Makoye Samwel @ Kashinje and Kashindye Bundala v. Republic**, Criminal Appeal No. 32 of 2014, and **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 (all unreported) and **Joseph Leonard Manyota** (supra), the Court has established that chain of custody of exhibits is said to be intact when there is proper documentation of the chronology of events in the handling of the exhibit from seizure, control, storage and transfer until tendering it in court at the trial. The referred-to decisions further inform us that although the chain of custody can be proved by way of the trail of

documentation, this is not the only criterion when dealing with exhibits. The above decisions also direct our minds to other factors to consider while ascertaining that the chain of custody of an exhibit is effective, as stated in **DPP v. Stephen Gerald Sipuka**, Criminal Appeal No. 373 of 2019 (unreported):

> *"to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court."*

In the instant appeal, the evidence of PW2 and PW4 and exhibit P.10 shows that on 4/5/2012 exhibits P.7. P8 and P9 were seized from the appellant's room. According to PW2 and PW4, the eight packets found in the golden-coloured suitcase (exhibit P11) were marked E, F, G and H while the four packets found in the black briefcase (exhibit P12) were labeled A, B, C and D. On 4/5/2012, sometime after 16.00 hours, PW2 handed over the seized items to PW4, who stored them in a container and recorded them as "*masanduku mawili na boksi lililokuwa na madawa ya kulevya*" meaning "*two suitcases and a box containing narcotic drugs*" (our translation). On 5/5/2012 he recorded them in the exhibit register. On 6/5/2012 night, the RCO Mbeya, PW2 and PW4 traveled to Dar es

Salaam with the exhibits for further analysis and arrived in Dar es Salaam on the morning of 7/5/2012. With the exhibits, they went directly to the Government Chemist Laboratory Offices. At the Government Chemist Laboratory, PW4 handed the seized parcels alleged to contain narcotic drugs labeled A to D and E to H to PW1 for analysis.

Upon receipt of the exhibits from PW4, PW1 took the exhibits which on entering the offices of the Government Chemist Laboratory they were labeled Lab No. 295/2012. When conducting his analysis of the exhibits allegedly seized from the appellant's bags, the contents were weighed and analyzed in the separate parcels they came in. Four parcels that were admitted as exhibit P7 were found to have no narcotic drugs while the other parcels which were admitted as exhibit P8 were found to contain narcotic drugs. Parcel "E" weighing 547.21 grams was found to have contents of a mixture of heroin hydrochloride and cocaine hydrochloride valued at Tshs. 23,524,450/= and admitted as exhibit P8. The parcels marked "F" to "H" weighing 1,465.87 grams were found to contain heroin hydrochloride valued at Tshs. 65,984,150/= and admitted as exhibit P9. The preliminary findings were confirmed by the confirmatory test conducted by PW1 from the samples he had gathered from each packet he was handed as can be seen from his report (exhibit P5). After the preliminary analysis and having taken the requisite samples for

confirmatory testing, PW1 handed back the exhibits to PW4. Thereafter, the Mbeya team traveled back to Mbeya on 8/5/2012 with the exhibits and on arrival in Mbeya, PW4 stored the exhibits in the exhibit storage room until the time they were presented at the trial. To be noted is the fact that the value of the narcotic drugs was assessed by Christopher Joseph Shelukindo (PW8) through use of the report from the analyst.

Certainly, in the instant case, apart from exhibit P5, and the search order and certificate of seizure, there is no paper trail of the movement of the exhibits. However, taking into account that the trial court found the prosecution witnesses who testified above on this issue to be credible witnesses and understanding that the demeanor of witnesses is the empire of the trial court, we cannot meddle with that. (See, **Marceline Koivugui v. Republic,** Criminal Appeal No. 469 of 2017 (unreported) **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 and **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (both unreported)).

The appellant has challenged the propriety of the certificate of seizure, arguing that in the absence of an independent witness to sign on it, no weight should be accorded to it and faulted the trial court for relying on it with such anomaly. The learned State Attorney conceded to the

absence of a signature of an independent witness in the certificate of seizure but contended that since the other witnesses who signed were found to be credible witnesses, it was proper for the trial court to give it weight. We have perused through exhibit P.10 and have also failed to see the signature of Yunus, who according to PW2 was one of the witnesses who signed on the certificate of seizure. Nevertheless, we are of the firm view that failure to have the signature of such a witness is not by itself fatal and it cannot vitiate the weight to be accorded to the exhibit especially where, like in the instant case, there is clear evidence that the appellant did sign on the certificate of seizure. In the case of **Song Lei v. The Director of Public Prosecution**, Criminal Appeal No. 16A of 2016 and No. 16 of 2017 (unreported), the Court observed that the signing of the certificate of seizure by the appellant meant acceptance that the narcotic drugs were found in his possession. We find this to be the correct direction in such circumstances as what is before us. We thus go along with the said finding and dismiss the complaint by the appellant finding it unmerited under the circumstances.

In the instant appeal, in our consideration of the sanctity of the chain of custody, we are also alive to the fact that the narcotic drugs in the charge against the appellant are not items that can be said to change

hands easily and thus the question of the sanctity of the chain of custody need also take that into account. The Court in the case of **Kadiria Kimaro** (supra), held that pellets of heroin weighing 1,365.91 grams could not change hands easily, whereas in the instant case, we are considering 547.21 grams of a mixture of heroin hydrochloride and cocaine hydrochloride and 1,465.87 grams of heroin hydrochloride which also cannot be said can easily change hands. In light of the case of **Kadiria Kimaro** (supra), we are of the view that in such circumstances application of the stringent principle established in **Paul Maduka and Four Others** (supra) regarding the paper trail, may be relaxed. We thus agree with the learned State Attorney that the chain of custody of the exhibits was not compromised and for the foregoing, this complaint falls.

The last grievance is one that faults the trial court for invoking the doctrine of recent possession in this case. The appellant did not amplify on this complaint in his written or oral submissions. Ms. Paul conceded to this complaint stating that the High Court improperly invoked this principle, however, she was quick to submit that taking into account the strength of the evidence to prove the charge against the appellant before the trial court, the infraction was minor and did not prejudice the appellant.

It is on record that one of the matters considered by the trial court was the application of the doctrine of recent possession. The trial court was of the view that the doctrine of recent possession can also be applied in cases with charged offences such as in the instant appeal. We find it pertinent to deliberate when the doctrine can be applied. In the case of **Mkubwa Mwakagenda v. Republic**, Criminal Appeal No. 94 of 2007 (unreported), the Court observed that there are four conditions that must be fulfilled for the principle of recent possession to apply for the purpose of a conviction stating that:

> *"For the doctrine of recent possession to apply as a basis of a conviction, it must be proved,* ***first****, that the property was found with the suspect,* ***second****, the property is positively proved to be the property of the complainant,* ***third****, that the property was recently stolen from the complainant and* ***lastly****, that the stolen thing constitutes the subject of the charge against the accused..."*
> [Emphasis added]

Clearly, in the instant case, there is no issue of the exhibits having been recently stolen which is the essence of the doctrine. Therefore, we agree with the learned State Attorney that with due respect, the trial court wrongly invoked the doctrine in the instant case. However, we find that this did not in any way prejudice the appellant since the conviction of the

appellant was based on the trial court believing the testimonies of the prosecution witnesses and finding that all the ingredients of the offence charged were proved beyond reasonable doubt. We thus find the anomaly curable. Therefore, this complaint also fails.

For the foregoing, when the evidence to prove the charge facing the appellant is considered, we agree with the learned State Attorney that the case against the appellant was proved beyond reasonable doubt. In the end, the appeal lacks merit. We thus dismiss the appeal.

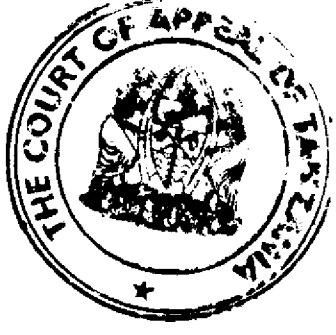
DATED at **DAR ES SALAAM** this 8th day of June, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2023 in the presence of Appellant, via video link from Ruanda Prison, and in the presence of Joseph Jackson Mwakasege, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



R.W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL