IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 623 OF 2021

SANO SADIKI ..... 1ST APPELLANT
TUKURE ALLY .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Mansoor, J.)

dated the 5th day of November, 2021

in

Criminal Sessions Case No. 2 of 2018

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JUDGMENT OF THE COURT

18th March & 9th August, 2023

MKUYE, J.A.:

The appellants, Sano Sadiki and Tukure Ally (the 1st and 2nd appellants) were arraigned before the High Court for the offence of illicit trafficking in narcotics contrary to section 16 (1) (b) (i) of the then, Drugs and Prevention of Illicit Traffic in Drugs Act (the DPITD Act). That Act was subsequently repealed and replaced by the Drugs Control and Enforcement Act, 2015. Upon trial, they were convicted and sentenced to pay fine of Tshs. 6,118,170,000/= together with a custodial sentence of twenty years. Aggrieved, the appellants have appealed to this Court against both conviction and sentence.

Before embarking on the appeal on merit we have found it apt to narrate albeit briefly, the facts of the matter. They go thus:

The appellants are Ugandan and Guinean citizens respectively. On the material day, 17/2/2015, the duo were driving a motor vehicle on their way to Dar es Salaam from the neighbouring Republic of Mozambique. On reaching at Nangurukuru village within the District and Region of Lindi, they were stopped at police check point. According to G. 5893 DC Raymond (PW10) who was stationed to man the check point, while conducting a routine inspection of the vehicle embarked by the appellants, he noticed that the vehicle had two fuel tanks which sounded unusual for such make of vehicles. He questioned the appellants on such unusual fixing of fuel tanks but there was no response from them. He, then, requested that the tank area of the vehicle be opened and appellants obliged. Upon opening the tank, PW10 discovered that there was an area leading to an artificial fuel tank. The lid leading to the tank was unscrewed and inside that tank, some forty packets containing a certain substance were retrieved. On inquiring from the appellants as to the contents of the packets, they stated that they contained heroine. The appellants were placed under arrest and taken to Kilwa Masoko Police Station. The suspected narcotics were then put in envelopes and handed to PW5, who was the Exhibits keeper.

According to ACP Joseph Mtafungwa (PW9), the Regional Crimes Officer (RCO)-Lindi Region, after receiving the information about the seizure of the contraband, he went to the scene of crime together with other officials to interrogate the suspects and supervise the packaging and sealing of the drugs with the involvement of the appellants. Thereafter, the Anti-Drug Unit (ADU) officer was informed about the incident and directed that the suspected narcotics be taken to its office at Dar es Salaam. On arrival at Dar es Salaam ADU offices, SSP. Neema Mwakagenda (PW2) accompanied the team from Lindi to the Chief Government Chemist (CGC) for laboratory testing of the suspected drugs. The test results as were narrated by Domician Dominic (PW1), confirmed that the substance was narcotic drugs of Heroine Hydrochloride.

As alluded to earlier on, the appellants were charged and stood trial before the High Court but pleaded not guilty. Upon the conclusion of the trial, the trial court was satisfied that the prosecution had proved its case to the hilt and convicted the appellants followed by the sentence.

Each appellant lodged his memorandum of appeal challenging the conviction and sentence. The 1st appellant's memorandum of appeal contains ten (10) grounds of appeal and the 2nd appellant's memorandum consists of twelve (12) grounds of appeal. For convenience, we wish to

cluster the grounds which are similar to both appellants together and the remaining grounds separately as follows:

1. *The information did not disclose the ingredients of the offence (ground 1 Sadiki, ground 2 Ally).*
2. *The 40 packets comprising Exhibit P1 were not labelled at the scene of crime (Ground 2 Sadiki, Ground 1 Ally.)*
3. *The conviction was grounded on Exhibit P1 whose chain of custody was broken (Ground 3 Sadiki and 11 Ally.)*
4. *The motor vehicle was not tendered in court as an exhiblt (Ground 4, Sadiki 10 Ally)*
5. *The evidence of PW1, PW2 and PW5 in relation to the colour of Exh. P1 was contradictory (Ground 5 Sadiki, Ground 9 Ally.)*
6. *The admission of Extrajudicial statements Exh. P4 and P5 was irregular (Ground 6 Sadiki, Ground 4 Ally.)*
7. *The certificate of seizure, Exh. P6 (Sadiki) and Exh P2 (Ally) was marked heroine before being tested (Ground 7 Sadiki, Ground 5 Ally.)*
8. *The defence evidence was not considered (Ground 9 Sadiki, Ground 8 Ally.)*
9. *The trial Judge did not consider that the 2nd appellant needed an assistance of interpreter as he was not fluent in Swahili language (Ground 6 Ally).*
10. *Prosecution failed to prove the charge beyond reasonable doubt (Ground 12 Sadiki, Ground 12 Ally.)*
11. *The trial Judge convicted the appellants in the ruling on a case to answer before defending themselves (Ground 8 – Sadiki alone.)*

12. The trial Judge did not sum up the 2nd appellant's defence evidence to the assessors (Ground 3 Ally alone.)

When the appeal was called on for hearing on 13/3/2023, Messrs. Stephen L. Lekey and Alex Peter Msalenge who were assigned dock briefs to represent the appellants prayed to be discharged from the conduct of this case after the appellants had refused to be represented. Therefore, the appellants fended themselves without representation. The respondent Republic enjoyed the services of Mr. Joseph Mauggo, learned Senior State Attorney teaming up with Ms. Tully Helela, learned State Attorney.

Each appellant adopted his grounds of appeal and preferred the learned State Attorney to respond first while reserving their right to rejoin later, if need would arise. In dealing with this appeal, we shall begin with the grounds on procedural irregularities followed by the substantive parts touching both appellants while the grounds specific to each appellant will be dealt with thereafter.

On the first ground of appeal, the appellants are complaining that the information filed against the appellants was defective for not disclosing the ingredients of the offence. It is contended that the same does not explain the manner the offence was committed such as manufacturing, using, possessing, selling etc. which the appellants were called on to answer.

In reply, Ms Helela argued that the information was sufficiently described as per section 132 of the CPA and that the word "trafficking" is defined under section 2(c) of the DPITD Act means manufacturing, selling, using, conveyance, importing etc. in the United Republic which is not required to be included in the charge. She added that the charge was self-explanatory as per section 16 (1) (b) (i) of the DPITD Act which was a charging provision and that, looking at the information at page 71 of the record of appeal, the appellants well understood it. To fortify her argument, she referred us to the case of **Remina Omari Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported).

In the second limb of his complaint, the 2nd appellant's argument is on the variance between charge in the committal proceedings and the information at the High Court in terms of the provisions of the law used to charge them and the value of narcotic drugs. The leaned State Attorney admitted that although there was no such a variance, she was quick to state that the charge at the committal court was not for pleading as the formal information was lodged in the High Court with jurisdiction for taking plea of the accused and his trial.

It is common ground that the appellants were charged under section 16 (1) (b) (i) of DPITD Act which provided as follows:

"Any person who -

(a)...

(b) traffics, diverts, or illegally deals in any way with precursor, chemicals, substances with drugs related effects and substances used in the process of manufacturing of drugs;

(c)...NA...

commits an offence and upon conviction shall be sentenced to life imprisonment."

The offence of trafficking in drugs as rightly submitted by Ms. Helela is defined under section 2 of the same Act to mean:

"the importation, exportation, manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance or any substance represented or held out by that person to be or narcotic drug or psychotropic substance or making of any offer but does not include..."

Our reading of sections 2 and 16 (1) (b) (i) of the DPITD Act shows that the offence of trafficking is committed in various manners as specified in section 2 of that Act. Looking at the complaint by the appellants, it may appear to be the case in the sense that the particulars of the offence do not clearly state which of the listed categories in section 2 of DPITD Act

did the appellants employ in the commission of the alleged offence. However, it should be noted that the various modes of dealing in drugs under section 2 of DPITD Act are not or do not represent types of offence but mere explanation of ways of committing the offence of trafficking consistent with the Court's decision in **Livinus Uzo Chime Ajama v. Republic,** Criminal Appeal No. 13 of 2018 (unreported).

In the case of **Hamis Mohamed Mtou v. Republic**, Criminal Appeal No. 2019 (unreported), the appellant had raised almost a similar complaint. The Court observed that the prosecution ought to have included in the particulars of the offence what the appellant was doing with the narcotic drugs so that he could understand well the allegations against him and marshal his defence. In the absence of particulars in the information and the evidence to cure the omission, the Court found the charge incurably defective and sustained the appellant's complaint resulting into the quashing of conviction and setting aside the sentence.

Applying the above to this appeal, the position in this appeal is different. This is so because of the evidence of the appellants who testified as DW1 and DW2. Both testified that on the material day, they were travelling from Mozambique hired to drive the motor vehicle to Uganda. It is clear from their testimonies that they did not deny about their travel

schedule. It can be deduced from the appellants' evidence that the mode of committing the offence involved was importation of drugs into Tanzania which was within the definition provided to under section 2 of the DPITD Act. In this regard, we are of the settled view that, the information was in order and understandable. We find no merit in this complaint and dismiss it.

The 2nd appellant's second limb on the information was that charge as read out in the committal court and the High Court differed to which complaint the learned State Attorney conceded. However, she contended that the charge at the committal court was of no effect as the appellants were not even allowed to enter a plea while the information on which they were asked to enter their plea was filed in the court with competent jurisdiction. We agree with the learned State Attorney's line of argument. Even if the two charges were different in the number of the packets and value of the drugs, the former charge had no bearing to their trial and conviction since everything was pegged on the later charge. In this regard, the appellants could not have been prejudiced in any way.

Next is the complaint by the 2nd appellant in ground No. 6 that he was not availed with an interpreter taking into account that he was not fluent in Swahili language. In his view, this infringed upon his right to a fair hearing. The learned State Attorney submitted in reply that the trial

judge was satisfied that he understood Swahili language even at the recording of his statement.

It is not in dispute that both appellants were foreigners. The 1st appellant was Ugandan who understood the Luganda vernacular language, Kiswahili and Mandingo from Guinea languages. The 2nd appellant was a Guinean who was conversant with Mandingo language from Guinea. Nevertheless, we have noted that Frank Michael (PW7) who recorded the 2nd appellant's extra judicial statement (Exh. P5) explained in court that he communicated with him in Swahili language and had a good accent of Kiswahili as can be seen at page 131 of the record of appeal. Besides, it was not brought to the attention of the court at the earliest opportune time that the appellant was in need of an interpreter. In addition, as was rightly submitted by the learned State Attorney, even the trial judge during trial within trial at pages 249 – 250 of the record was satisfied that the appellant recorded a cautioned statement in Swahili language which he was conversant with. This being the case, we are of the considered view that, raising this complaint at this stage is an afterthought.

The other complaint by the 2nd appellant is that the trial judge failed to give reasons for finding that the appellants had a case to answer and

that instead, she made a predetermined conviction against the appellants before they defended themselves. In reply, Ms. Helela submitted that the style used by the trial judge in his ruling on a case to answer was in accordance with section 293 (2) of the CPA. She, thus, argued that it was not true that the trial judge predetermined conviction against the appellants.

The ruling on the case to answer is found at page 156 of the record of appeal. The contested ruling in part reads "... *the court considers that there is evidence that the accused persons committed the offence charged and are liable to be convicted...".* Section 293 (2) upon which the said ruling is predicated provides that:

> *"(2) Where the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court,* ***if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of sections 300 to 309 he is iiable to be convicted,*** *shall inform the accused person of his right-*
>
> *(a) to give evidence on his own behalf; and*
>
> *(b) to call witnesses in his defence, and*

shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights. [Emphasis added]

It is crystal clear from the record that the appellants were informed in terms of section 293 (2) of the CPA that they had a case to answer. Apart from informing the accused that he has a case to answer, the section enjoins the trial court to address him of his right to defend himself in the manner he can do it together with the right to call witnesses. We do not agree with the appellants that the trial court pre- determined conviction as the language used by the trial Judge in the ruling is the same as used in section 293(2) of the CPA. In the case of **Mohamed Ally @ Sudi Sudi v. Republic**, Criminal Appeal No. 274 of 2017 (unreported), the Court considered a similar complaint and stated that:

"We agree with Mr. Mohamed that at the close of the prosecution case, on 25/5/2017, the words the trial judge used in his Ruling to the effect that "there is evidence that the accused committed the offence" were in compliance with the provisions of section 293 (2) of the CPA. Further to that, since the appellant was permitted to defend himself, given his right to call witnesses and his defence

considered in the decision of the trial judge, then,
the issue of unfair trial cannot rise."

Regarding the 1st limb of complaint that the trial judge did not assign reasons for finding the appellants had a case to answer, we think, it cannot stand since it is not a requirement of law to do so.

Consequently, we do not see any merit in the complaint and dismiss it.

The other complaint is that the 40 packets (Exh.P1) were not labelled at the scene of crime after being seized in order to avoid tempering with it (ground 2 of Sadiki and ground 1 of Ally); and that the trial court wrongly relied on Exhibit P1 (40 packets) because the chain of custody was broken (grounds 3 for Sadiki and 11 for Ally). The appellants, also, assailed the certificate of seizure for being written heroine before the alleged drugs were tested. (Grounds 7 for Sadiki and 5 for Tukure).

In response, Ms Helela conceded that indeed the packets (Exh P1) were not labelled at the scene of crime. However, she submitted that there was an explanation for the failure to label them. She stated that Athuman Abdulrahaman Momolo (PW8) who was the seizing officer and PW10 testified in court that it was unsafe to label them at Nangulukuru because it was raining. The learned State Attorney went on arguing that, immediately after reaching Kilwa Police Station it was received by Yakubu

Mohamed (PW5), the Exhibits keeper who entered it in the Exhibit Register and labelled it. She contended further that according to the record, the same were packed and labelled on 8/2/2015 in the presence of the appellants, PW5, PW8, PW9 and PW10. She was convinced that the chain of custody was transparent and that there was no posibility of tempering with it.

Ms. Helela submitted further that, PW8 testified that the exhibit was packed in envelopes and the appellants wrote their names and mobile phone numbers. She relied on the evidence of PW9 who explained how the appellants were informed about the packaging for transmission to the Chief Government Chemist. According to PW10, she said, the appellants were removed from lock up so as to witness the packaging. She wondered why the appellants did not cross examine the witnesses on their presence if they had any concern with the integrity of the chain of custody.

As regards the issue that there was no documentary evidence proving the chain of custody, Ms Helela contended that, despite the fact that there was no such evidence, there was oral evidence from PW1, PW2, PW5 and PW8 who proved movement of the exhibit from seizure to the time the drugs were tendered in court. To fortify her argument, she referred us to the case of **Marceline Koivogui v. Republic** Criminal

Appeal No. 469 of 2017 (unreported), where the Court held that the documentation is not the only requirement in dealing with exhibits and it will not fail the test merely because there was no documentation and that other factors have to be looked at depending on the prevailing circumstances in each particular case. She also relied on the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), to stress the principle that the requirement for documentary evidence is relaxed where what is to be proved involves items which do not change hands easily. Relying on the case of **Kadiria Said Kimaro v. Republic,** Criminal Appeal No. 301 of 2017 page 11 (unreported), she argued that, the exhibit was such that it could not change hands easily and, therefore, could not be easily tempered with.

We shall start with the issue of labelling of Exh. P1 at the scene of crime. As was conceded by Ms. Helela, it is true that the same was not labelled at the scene of crime the reason being that it was raining as was testified by the seizing officers PW8 and PW10. We agree that, owing to the nature of the item, it was unsafe to continue keeping it there hence taking it to Kilwa Masoko Police Station. At any rate, PW10 explained clearly that on arrival at the Police Station, the suspected narcotics were on the same day handed over to PW5 (the exhibit keeper), who recorded it in the Exhibit Register and kept it in safe custody. Evidence shows that,

on the following day; 8/2/2015, PW5 retrieved the narcotics in the presence of the RCO, Regional Security Officer (RSO) and the appellants, labelled and packed them in twenty envelopes each with two packets and the appellants signed or wrote their names and their mobile phone numbers on the envelopes. Then, the envelopes were put in a box which was initialed with an IR number. In the circumstances, we are of the view that the labeling sufficed as it did not prejudice the appellants.

As regards the chain of custody, PW5 explained on how on 9/2/2015 together with the RCO and RSO took the narcotics to ADU offices in Dar es Salaam where they were met by PW2. According to PW5, while in the company of PW2 he delivered the said narcotic drugs to the Chief Government Chemist (CGC) office for testing which was conducted by PW1. Upon completion of the testing, they were handed back to him (PW5) who also handed over to PW2.

PW2's testimony, corroborates PW5's evidence from the date the narcotics were brought from Lindi to ADU offices then to the CGC's office for testing and how the same were handed over to her by PW5 for safe custody until the moment she took them to the court for tendering in court. As it can be noted, although no independent witness was present at the time of labelling and packaging, the exercise was carried out in the

presence of the appellants and they signed. With this revelation, like the trial court we do not agree that the chain was broken at any stage merely due to lack of documentation. Considering the Court's decision in the case of **Marceline Koivogui** (supra) holding that documentation is not the only way of dealing with exhibits depending on the prevailing circumstances. In the case of **Issa Hassan Uki** (supra), the Court stated clearly that for the items which cannot easily change hands, and not prone to tempering, the requirement for documentation is not necessary where oral evidence is self-explanatory. See also: **Kadiria Said Kimaro** (supra) and **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported)).

Much as there was no paper trail to document movement of the exhibit, we agree with Ms. Helela that the chain of custody in this case was sufficiently accounted for from the beginning to the end. PW8 and PW10 testified how on 7/2/2015 the narcotic drugs were seized at Nangurukuru village and how they were taken to Kilwa Masoko Police Station and handed over to PW5 for safe custody. PW2, PW5, PW8, PW9 and PW10 explained how, on 8/2/2015, they were packed in twenty envelopes and labelled in the presence of the RCO, RSO and the appellants and that the appellants wrote their names and mobile phone numbers. Not only that, transparency existed even when the same were

transported from Lindi to ADU offices, and eventually to the CGC's office and back to ADU offices until were taken to Lindi for tendering in court. With this revelation, we find that the contention by the appellants that the chain of custody was broken does not hold water and, therefore, this complaint is devoid of merit and we dismiss it.

Next is on the complaint against recording in the certificate of seizure as "heroine" before it was examined. This complaint will be dealt with conjointly with the 2nd appellant's complaint that it was wrong for the trial Judge to convict the appellants on the basis of Exh P1 and a certificate of seizure which was allegedly retrieved contrary to section 38(1) (2) (3) and 40 of the CPA, section 35 (3) of the Police Force Act and PGO 229. Ms Helela conceded that in the certificate of seizure it was recorded "heroine" but argued that the recording did not prejudice the appellants since PW1 is the one who proved it to be heroine. Regarding the manner the same was retrieved, the learned State Attorney argued that, although the search order was not filled, the seizure was carried out by PW8 who was the OC-CID himself without prejudicing to the appellants. In any case, she submitted, it was the appellants themselves who said that they carried heroine when asked by the police. Ms Heiela added that, the search was carried out in an emergence situation under section 42 of the CPA.

Our perusal of the record of appeal shows that indeed, in the certificate of seizure, it was filled among others that the appellants were found in possession of drugs of the type of heroine. The certificate was filled by the police officer on 07/02/2015 at about 21:50 hours immediately after the appellants' arrest but prior to being taken to the CGC for testing. According to PW8, it was the appellants themselves who gave a clue to the arresting officers that they were carrying drugs of the type of heroine which might have influenced PW8 to fill in the certificate of seizure that the substance was heroine, independent of the testing by the CGC. This complaint is thus found to be baseless and we dismiss it which takes us to the determination of the complaint against the alleged non-compliance with section 38(1) of the CPA.

It was the respondent's contention that the search was made in an emergence situation. PW8 testified that, he did not fill PF180 of the PGO but the arrest of the appellants and seizure of the narcotic drugs which turned to be heroine were done in the presence of Bena Ally Malapa (PW4) who was an independent witness as well as PW9 and PW10. Section 38 (1) of the CPA permits a police officer in charge of the police station if satisfied that there is, reasonable ground for suspecting that there is, in any building, vessel, carriage, box receptacle or place anything to search or issue a written authority to any police officer under him to search the

building, vessel, carriage, box, receptacle or place, as the case may be. In this case, since the search officer was the in charge of investigation in the district, we do not think that he needed a written authority from OCS.

On the other hand, section 40 of the CPA provides for the time within which search is to be conducted, which is between the hours of sunrise and sunset except that the court may, upon application by the police officer or other person, permit him to execute it at any hour. And, section 35 (3) of the Police Force Act requires in mandatory terms the officer seizing anything in pursuance of the powers conferred by subsection (1), to issue a receipt acknowledging the seizure of that thing bearing the signature of the owner of the premises, and those of witnesses of such search, if any.

In the case at hand, it is common ground that search was conducted without any search warrant neither was there any receipt issued acknowledging the seized property. In addition, although the search was conducted during night hours, there is no indication that there was any permission granted by the court as required by the law. That notwithstanding, there was sufficient explanation to warrant the search in the manner it was done. A search warrant was not necessary since the search was conducted by the Officer In-charge of investigation in the District who did not require such a permission. Similarly, there was

sufficient explanation on the lack of receipt through evidence that at that time, it was raining and therefore unsafe to continue keeping the suspected drugs there awaiting fulfilment of the requirements. Regarding lack of permission to conduct search during the night, it was also explainable since it was an emergence search at Nangurukuru check point where PW10 in his routine work came across the contraband in question. The prevailing circumstances warranted the search without any warrnt which was justified by section 42 (1) and (3) of the CPA. Yet again, we see no merit in this complaint and dismiss it.

The other complaint was on failure by the prosecution to tender in court the motor vehicle that was used to transport the drugs as it could have shown whether or not had two fuel tanks to which the learned State Attorney readily conceded. However, she was quick to state that there was direct evidence from PW4, PW8 and PW10 who found the exhibit in the said motor vehicle. She was of the view that in such a situation, tendering of the motor vehicle involved would not have added anything to the evidence of eye witnesses. In any case, she said, that did not prejudice the appellants.

It is true that the motor vehicle which was found carrying the drugs was not tendered in court as exhibit although it is on record that the same was taken to Kilwa Police Station. However, it is our considered view that,

it is not in every case where exhibit or instrument used in the commission of the offence is not tendered, the prosecution case will flop. In this case, as was rightly submitted by Ms. Helela, there was strong evidence from PW4, PW8 and PW10 on how the motor vehicle was found with two fuel tanks and how on opening one of them, with the assistance of the 2nd appellant, the drugs were discovered. PW4 was a hamlet chairperson; an independent witness who also witnessed the retrieving of the drugs. In this regard, we find that this ground lacks merit and we dismiss it.

In their grounds 5 and 9 respectively, the appellants' complaint is that PW1, PW2 and PW5 contradicted themselves on the colour of exhibit P1 (the drugs) which rendered their testimony to be incredible, improbable and unreliable to establish their guilty. On her part, Ms. Helela while conceding that there was such a contradiction relating to the colour of Exh P1, she argued that the trial Judge also noted it and found that despite such discrepancy, there was no evidence showing that the exhibit was tampered and that PW1 was the one to tell the truth. The leaned State Attorney contended further that even if there was such a contradiction, it did not go to the root of the matter. She referred us to our decision in **Kivula William and Another v. Republic,** Criminal Appeal No. 119 of 2020 and **Chukwundi Denis Okechuku and 3 Others v. Republic,** Criminal Appeal No. 507 of 2015 (both unreported).

In the case of **Kivula William** (supra), the Court stated that not every contradiction or discrepancy on witnesses' account will be fatal to the case. Minor discrepancies on details due to normal errors of observations, lapse of memory on account of passages of time or due to mental disposition such as shock or horror at the time of occurrence of the event could be disregarded whereas fundamental discrepancies that are not expected of a normal person count in discrediting a witness. On the other hand, in the case of **Chukwundi Denis Okechuku and 3 Others** (supra), the Court considered discrepancies regarding who was the proper ten cell leader where the drugs were recovered and the police station where the drugs and appellant were taken from the scene of crime. The Court stated that:

> *"...In our view, the discrepancies were inconsequential, as they did not go to the root of the case. The actual point which was made by the testimonies of the witnesses on that aspect, was to the fact that, the substance believed to be narcotic drugs, was recovered in the house where the first appellant and his co-appellants were found on the material night, and that after being seized, they were sent to the police station together with the appellants".*

In this case, like the learned State Attorney, we agree that there were discrepancies in the evidence of PW1, PW2 and PW5 regarding the colour of the drugs retrieved. According to PW1 who conducted preliminary test and confirmatory tests testified that when colour test was conducted, it changed from red-purple to purple (page 82); PW2, the exhibit keeper at ADU who witnessed the testing of drugs at the CGC office testified that the substance changed colour from cream colour to dark green (page 90). PW5, the exhibit keeper at Kilwa Masoko Police Station testified that the drugs were brown in colour (pages 103 and 106). The trial Judge considered the discrepancies regarding the colour changing during the testing and testing results and found that they were cleared by PW1; an officer from the CGC's office who said that after testing they were found to be heroin and added that in the absence of other evidence showing that there was tempering with the same, it cannot be doubted that they were the same.

We do not find any reason to fault the trial Judge's finding. Based on the available evidence, we find that despite the discrepancies in PW1, PW2 and PW5 regarding the colour that might have happened due to lapse of memory caused by passage of long time before the witnesses testified, such discrepancies were minor which did not go to the root of the case. At any rate, there is nowhere in the record of appeal showing

that there was tampering with the drugs so as to impute that they might not be the same. Apart from that, we find that in view of PW1's evidence confirming that the substance was heroine, such discrepancies regarding colour are minor as they do not go to the root of the matter. Hence, this ground lacks merit and we dismiss it.

The other complaint relates to the alleged failure by the trial judge to sum up the defence evidence of 2nd appellant to the assessors. According to the 2nd appellant, failure to do so caused the assessors to base their opinion on the prosecution evidence only. On the other hand, Ms. Helela controverted such contention submitting that, the assessors gave their opinions on the basis of what they heard in evidence. She took us to pages 194 and 195 of the record of appeal where Assessors No. 2 and 3 took note and considered the 2nd appellant's defence which was a general denial in their opinion.

On our side, having revisited the record of appeal, we are satisfied that the 2nd appellant's evidence was summed up to assessors. Since the appellants in certain instances gave a similar defence, the trial judge summarized it generally (pages 186-188) but in situations where each gave evidence relating to himself, she summarized it separately. As was rightly submitted by the learned State Attorney, the assessors were not biased as they considered what was before them. All assessors considered

the evidence from both sides as reflected at pages 194 and 195 of the record of appeal and opined that the appellants gave a general denial to the commission of the offence which could not assist them. It is, therefore, not true that the 2nd appellant's defence evidence was not summed up to the assessors. In this regard, we find that this ground is unmerited and we dismiss it.

The other complaint featuring in grounds 9 and 8 respectively relates to the alleged trial judge's failure to consider the appellants' defence evidence. The 1st appellant's complaint is that the trial court failed to appreciate the weight of his defence while the 2nd appellant's claim is that his defence evidence was not analysed.

The learned State Attorney submitted that their defence evidence was considered as reflected at pages 252 to 254 of the record of appeal only that they gave a general denial which was rejected by the trial Judge. Looking at the record of appeal from pages 252 to 254, we find that the trial Judge sufficiently dealt with the appellants' defence evidence. The trial Judge appreciated that the appellants gave a general denial to the offence while admitting to have been in the vehicle with Reg. No. UAU 789 Z, Land Cruiser VX Station Wagon, Silver in Colour the property of Omari Mutaba to which the 1st appellant testified to have been permitted by the owner to drive it from Kampala to Mozambique and back to

Kampala only to be stopped by the police at Nangurukuru on 07/02/2015. The 2nd appellant gave a similar defence as the 1st appellant regarding the registration and make of the vehicle belonging to Omari Mutaba and how they were stopped by the police at Nangurukuru. The trial Judge weighed their evidence against the prosecution evidence that the vehicle they were possessing was found with 40 packets of heroine. Considering that the appellants failed to give a plausible evidence/defence as per section 26 of the DPITD Act, the trial Judge found that the prosecution managed to prove their case beyond reasonable doubt.

In view of the foregoing, we do not find any reason to fault the trial Judge's finding because the appellants' defence evidence did not shake the prosecution evidence. Looking at the totality of the prosecution evidence, there is no doubt that it proved the case against the appellants beyond reasonable doubt. Thus, these grounds also fail and we dismiss them.

In grounds 6 and 4 respectively, the appellants are complaining that their extrajudicial statements (Exh P4 and P5) were not properly admitted because, according to the 1st appellant, he did not understand Swahili language and that the 2nd appellant's statement was admitted without having been shown to him. Regarding the 1st appellant's complaint, we agree with Ms. Helela's submission that, he understood Swahili language

and that the extrajudicial statement was recorded as such. We have already held earlier on that the 1st appellant was conversant with Swahili language considering that he is recorded to have said that he could speak Kiswahili language; *"Nazungumza Kiswahili hafifu"* (See pages 114-115 of the record of appeal). We find nothing of substance in this ground and dismiss it.

As for the 2nd appellant's complaint, Ms. Helela argued and we agree with her that that issue cannot be raised now since his extra judicial statement was admitted without any objection from the defence counsel. Moreover, it was read over after being admitted as exhibit.

We are firmly of the view that this complaint lacks legs to stand on. As was rightly submitted by the learned State Attorney, the record of appeal clearly shows at page 131 that when the prosecution prayed to tender his extra judicial statement in court, the learned advocate representing the appellant did not object to its being tendered and thus it was admitted as Exh P5. Apart from that, after it was admitted by the trial court, it was read over by PW5 in court (page 131). We thus, fail to comprehend why the 2nd appellant claims that it was not shown to him. Therefore, grounds Nos. 6 and 4 are not merited and we hereby dismiss them.

Before penning off, we wish to address one more issue relating to sentence meted out against the appellants. Upon conviction, both appellants were sentenced to a fine of TZS. 6,118,170,000.00 which is equal to three times of the market value of the heroine found with them which was valued at TZS. 2,639,390,000.00. In addition to the fine imposed, they were each ordered to serve an imprisonment term of 20 years as per section 16 (1) (b) (i) of the DPITD Act. When prompted to comment on sentencing in view of section 172 (2) (c) of the CPA, the learned State Attorney was of the view that the punishment was illegal in view of the amendment effected through Written Laws (Miscellaneous Amendments) Act 2016 (Act No. 6 of 2016) in which the custodial sentence was enhanced to life imprisonment. She thus, implored the Court to revise the sentence under section 4 (2) of the Appellate Jurisdiction Act (the AJA) and enhance it in accordance with the law. On their side, both appellants resisted the proposition made by the learned State Attorney.

On our part, we find that the learned State Attorney is not right. This is because the offence was committed on 07/02/2015 when the law was yet to be amended. At that particular time, section 16 (1) (b) (i) of the DPITD Act provided as follows:

"Any person who -

(a) - nil-

(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable -

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

This was the position of the law prior to its amendment and before the offence was committed. We are minded of the principle enshrined under Article 13 (6) (d) of the Constitution of the United Republic of Tanzania,1977 that one cannot be punished under the law which did not exist at the time of the commission of the offence. We thus do not agree with Ms. Helela's invitation to enhance the custodial sentence to life imprisonment.

Conversely, we note that section 172 of the CPA gives guidance on how courts can pass sentences. It provides as follows:

"172 (1) Whenever a subordinate court passes a sentence which requires confirmation, the court imposing the sentence may in its discretion release the person sentenced on bail pending confirmation or such order as the confirming court may make.

(2) Where-

a) - n/a-

b) - n/a-

c) ***a person has been in remand custody for a period awaiting trial,***

his sentence whether it is under the Minimum Sentences Act, or any other law, shall start to run when such sentence is imposed or confirmed as the case may be, and such sentence shall take into account the period the person spent in remand".

[Emphasis added]

According to the above provision, three scenarios emerge; **one** custodial sentence begins to run when the sentence is imposed. **Two,** where a person has been remanded in custody for a period awaiting trial and or sentence, the time spent in remand has to be taken into account when considering sentence. **Three**, the principle set out in the provision applies regardless of whether the sentence is mandatory or discretional including those under the Minimum Sentences Act. We would add that

the time spent in custody by such persons include the periods spent in detention by the police and at remand.

In this case, it is common ground that the appellants were charged with the offence punishable by a custodial sentence of not less than twenty years. They were kept in remand custody since 07/02/2015 when they were arrested until on 05/11/2021 when their trial was completed, convicted and sentenced to serve imprisonment for a term of twenty years. Mr. Robert Dadaya, learned advocate for the appellants in mitigation made on 05/11/2021 pleaded, amongst others, that the appellants had been in remand custody from 07/02/2015 until that day, which was almost six years and nine months period, the trial Judge considered that factor but reasoned that the section did not apply to minimum sentence of twenty years imprisonment imposed on the appellants presumably because the punishment was couched in mandatory terms.

Be it as it may, we think that had the learned trial Judge applied her mind to the provisions of section 172 (2) (c) of the CPA, she would have taken into consideration the period the appellants had spent in prison before they were sentenced. Under the circumstances, mindful of section 4 (1) of the AJA and section 172(2) (c) of the CPA, we are constrained to invoke our revisional powers bestowed on us under section 4 (2) of the

AJA and deduct the period of six years and nine months from the sentence of twenty years imprisonment. Thus, the appellants shall serve a custodial sentence of thirteen years and three months from 05/11/2021 when they were convicted and sentenced.

In the event, except for the sentence which we have reduced, we find that the appeal is devoid of merit. We accordingly dismiss it.

It is so ordered.

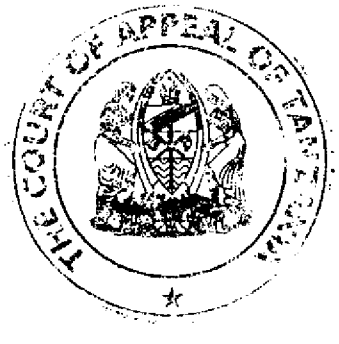
DATED at **DAR ES SALAAM** this 4th day of August, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 9th day of August, 2023 in the presence, via video, of Appellants in person and Ms. Atuganile Nsajigwa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL