IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 209 OF 2019

LUTHGNASIA SIMON MUSHI @ VUMI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate Court of Moshi, at Moshi)

(Tiganga, PRM – Ext. Juris.)

dated the 10th day of June, 2019

in

Ext. Juris. Criminal Sessions Case No. 14 of 2016

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JUDGMENT OF THE COURT

14th & 25th August, 2023

MWAMBEGELE, J.A.:

The Court of the Resident Magistrate of Moshi (Tiganga, PRM – Ext. Juris, as he then was) sitting at Moshi, convicted the appellant Luthgnasia Simon Mushi @ Vumi of the offence of trafficking in narcotic Drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 of the Revised Edition, 2002. It was alleged in the particulars of the offence that on 24th April, 2014 at Market Street Area within Moshi District in Kilimanjaro Region, she was found trafficking in 234 sticks of cannabis sativa commonly

known as bhang. She was sentenced to life imprisonment. Aggrieved, she has preferred this appeal against both conviction and sentence.

The material background facts to this appeal, as can be gleaned from the record of appeal, are not difficult to comprehend; they go as follows. On 24th April, 2014 at about 1615 hours, a police officer going by the name of Insp. Bernard Kapusi who testified as PW2, while in his office at the Moshi Central Police Station was informed by a certain Constantine Masumbuko that a girl passing by the police station had cannabis sativa in the brown handbag she was carrying. He was shown the alleged girl and with the help of WP Bakita (PW3) followed that girl and arrested her at the gate of the Traffic Police Station. That girl is the appellant herein. They took her to the investigation office at the Central Police Station where a search was conducted in the presence of D/Sgt Hashim (PW1) and Fredy Elias Ngole (PW4), an independent witness. The search revealed that in the brown handbag, the appellant had 234 sticks rolled in khaki papers which were later identified to be cannabis sativa. PW2 handed the 234 sticks to PW1 who stored them in the exhibit room. On 18th July, 2014 PW1 took the seized consignment to the Government Chemist Laboratory Authority (GCLA), Arusha where it was received by Erasto Lawrence (PW8), a chemist. PW8 took a sample of four sticks and returned the remaining 230 sticks to PW1. Later, PW8 took the sample to Mwanza GCLA zonal offices where

it was received by Tupeligwe Reuben Mwaisaka (PW5), a chemist. PW5 examined the sample and found it to be cannabis sativa. She prepared a report which was admitted in evidence as Exh. P6. The exhibit register was admitted as Exh. P1. While the handbag was admitted at the trial as Exh. P3, the 230 sticks were admitted as exhibit P4.

In her defence, the appellant dissociated herself with the charge against her. She denied having been arrested at the police station as alleged by the prosecution. She testified that she was arrested at the Central Market but not in possession of the alleged cannabis sativa. She associated the arrest and connection with the offence with a dirty game played by the said Constantine Masumbuko who happened to be her former boyfriend and had promised to manufacture a case against her after she had conceived pregnancy of another man while he was in jail for armed robbery. Having heard both sides, the learned Principal Resident Magistrate with extended jurisdiction was satisfied that the case by the prosecution had been proved against the appellant to the hilt and sentenced her as stated above.

Her appeal to the Court comprises seven grounds. However, we think, the grounds of grievance can be condensed to the following complaints: **one**, that section 192 (4) of the Criminal Procedure Act was not complied with; **two**, that the chain of custody of the alleged cannabis sativa was broken; **three**, that

the prosecution case was marred with inconsistency and contradictions; **four**, that the sentence of life in prison was unconstitutional; and **five**, the case against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented. The respondent Republic appeared through Ms. Cecilia Mkonongo, learned Principal State Attorney, Mr. Henry Chaula, learned State Attorney and Ms. Grace Kabu, also learned State Attorney. Fending for herself, the appellant sought to adopt as part of her oral arguments the written submissions she had earlier filed in support of the grounds of appeal. She reserved her right of rejoinder if need to do so would arise.

We propose to deal with the last ground of complaint to the effect that the prosecution did not prove the case against the appellant beyond reasonable doubt and in that process we shall be addressing other grounds of grievance as well.

In arguing the general ground that the case against her was not proved beyond reasonable doubt, the appellant submitted in its support with respect to the place of arrest, whether the alleged brown handbag belonged to her, examination of only four sticks of the alleged cannabis sativa, the chain of

custody of the alleged cannabis sativa and inconsistencies and contradictions in the testimonies of the prosecution witnesses.

As regards the place of arrest, the appellant stated at the outset that the prosecution did not discharge its burden of proving this issue beyond reasonable doubt. She submitted that the trial court took for granted that what was stated in the facts brought to the fore by the prosecution during the preliminary hearing was not plausible in that section 192 (3) of the Criminal Procedure Act, Cap. 20 of the laws of Tanzania (the CPA), was not complied with. In the premises, she submitted, there was no proof at all that she was arrested at Market Street as claimed by the prosecution. She cited to us our decision in **MT. 7479 Sgt. Benjamin Holela v. Republic** [1992] T.L.R. 121 to buttress the proposition that the provisions of section 192 (4) of the CPA which provides that a memorandum of undisputed matters prepared under section 192 (3) of the Act may not be relied upon if the same is not read to an accused person. She added that in view of the fact that it was doubtful on where exactly the appellant was arrested, the doubt should be resolved in her favour.

Responding to this ground of complaint, the learned Principal State Attorney submitted that the provisions of section 192 of the CPA were enacted with a view to expediting trial. She argued that the section was complied with to the letter because, at pp 40 – 42, the learned trial magistrate indicated that

the parties to the case signed the memorandum of matters not disputed after compliance with section 192 (3) of the CPA. The learned Principal State Attorney thus implored us to find the complaint as wanting in substance and dismiss it.

We agree with Ms. Mkonongo that section 192 of the CPA was enacted with a view to expediting criminal trials and thus its noncompliance cannot invalidate proceedings. However, in the case at hand, as rightly put by Ms. Mkonongo, it cannot be said that section 192 was flouted. This is because, at p. 41 of the record of appeal, the learned trial Principal Resident Magistrate certified that the parties have signed the memorandum of undisputed matters after complying with section 192 (3) of the CPA. We thus agree with Ms. Mkonongo that this complaint has no justification. We dismiss it. With regard to the place of arrest, we agree with the appellant that it was not without doubt that she was arrested at Market Street. We shall revert to this discussion at a later stage infra.

The appellant also challenged whether the brown handbag in which the alleged cannabis sativa was found belonged to her. She submitted that PW1, PW2, PW3 and PW4 testified that they saw the appellant carrying the brown handbag but none of them testified on whether the bag had any mark to show and verify that it belonged to her. She contended that it would be unsafe to assume that the handbag belonged to her merely because the witnesses

testified so. A signature, a tag or a particular mark, she argued, would have been an excellent proof that the same belonged to her. In the circumstances, she submitted, there is doubt as to whom the handbag belonged and that doubt must be resolved in favour of the appellant and she implored us so to do.

Responding, Ms. Mkonongo submitted that there was ample evidence from PW2 and PW3 to prove that the brown handbag belonged to the appellant. She added that at p. 80 of the record of appeal Constantine Masumbuko told PW2 that the appellant passing by the Central Police Station carrying the brown handbag was in possession of the alleged cannabis sativa and upon follow-up they arrested her with the same. The search was witnessed by PW4; an independent witness and, as appearing at p. 50, D/Sgt Hashim (PW1) recognized it as the only handbag in the exhibit room and that it was labelled.

We have considered the contending arguments by the parties to this appeal on this complaint. Having so done, we agree with the learned Principal State Attorney that there was ample evidence to prove that the brown handbag belonged to the appellant. PW3 who was informed by an informer but later named him to be Constantine Masumbuko arrested the appellant who was holding that bag. That arrest was done in the presence of PW2. The same bag was seen by PW4, an independent witness who was called to witness the bag being searched. That is sufficient evidence by the prosecution to prove that the

brown handbag belonged to the appellant and that she was arrested carrying it. That will be enough to prove that the complaint has no substance.

The appellant also complained of examination of only four sticks of the alleged cannabis sativa; that it could not be safe to conclude that the remaining 230 sticks were also cannabis sativa. She submitted that having tested only four out of the 234 sticks, there was a reasonable possibility that the remaining 230 sticks could not be cannabis sativa if they were also analyzed. She added that PW5 testified that she analyzed only four sticks which weighed 9.65 grams and the result she got was that it was cannabis sativa. In the circumstances, she argued, it was unsafe and wrong to believe that the appellant was found in possession of 234 sticks of cannabis sativa. It would be safe, she contended, to state that she was found in possession of four sticks of cannabis sativa, not 234. This is because, she went on to submit, no evidence was led to prove that the 234 sticks were all opened and mixed and the samples taken from that mixture.

Responding to this complaint, the learned State Attorneys, Ms. Mkonongo and Ms. Kabu, submitted that there was evidence from the prosecution showing that the 234 sticks were identical. Ms. Mkonongo referred us to p. 113 of the record of appeal where Erasto Lawrance (PW7), a Chemist stationed at Arusha GCLA Northern Zone testified that he counted the sticks and found them to be

234 and opened some to take a sample and found them to contain leaves-like dried substance which were identical. The learned Principal State Attorney thus submitted that it was not unsafe to state that the 234 sticks were rolls of cannabis sativa. Ms. Kabu added that the appellant's complaint was an afterthought because the certificate of seizure of both the brown handbag and the 234 sticks were tendered in evidence without any objection from the appellant. For that reason, she implored us to ignore the appellant's complaint as an afterthought.

This complaint is unfounded. The four sticks were taken as a sample. Surely, the appellant did not expect the prosecution to take all the 234 sticks to the GCLA for analysis. The appellant agrees in her written submissions that it would have been appropriate if she would be charged with possession of the four sticks and not the 234. We are afraid we are not prepared to go along with her. The analysis of the sample of four sticks taken represented the 234 sticks allegedly seized from the appellant. We dismiss this complaint.

Another complaint was on the chain of custody of the alleged cannabis sativa. The appellant submitted that at p. 124 of the record of appeal, Joyce Njisya (PW9), testified that the four sticks taken to the GCLA were never returned and the remaining 230 were given back to PW1. She wondered how come the prosecution again tendered all the 234 sticks. She added that the

circumstances showed that either no sample was taken to GCLA as alleged, or that is an ingredient of fabrication as she stated in defence. She submitted that the same was the case in **Mussa Hassan Barie and Another v. Republic**, Criminal Appeal No. 292 of 2011 (unreported) and the Court held that the integrity of the chain of custody was questionable in the circumstances.

Still on the chain of custody, she submitted that it was doubtful if the 234 sticks allegedly found in possession of the appellant were the very ones that were taken to the GCLA in Arusha and later Mwanza for chemical analysis. She cited to us our decision in **Zainab Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015 (unreported) in which we insisted on the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with from the time it is collected from a suspect to the time when it is finally presented in court as an exhibit.

Ms. Mkonongo submitted in response that the chain of custody did not break from the moment the 234 sticks of cannabis sativa were collected from the appellant to the moment it was tendered. She added that in view of what we observed in a number of cases, cannabis sativa is not an item which changes hands easily and therefore not easy to tamper with. One of such cases is **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported) in which we held at p. 23 of the typed judgment

that in respect of items which cannot change hands easily and therefore not easy to tamper with, the principle set out in **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), will be relaxed. Ms. Kabu added another authority, **Director of Public Prosecutions v. Akida Abdallah Banda**, Criminal Appeal No. 32 of 2020 (unreported) in which we recited that position. Both learned State Attorneys thus urged us to find this ground of complaint without substance.

We have considered the contending arguments on this issue. As shall become apparent in the course of determination of the general ground hereinbelow, that the case against the appellant was not proved beyond reasonable doubt, determination of this issue becomes redundant. We only wish to state at this stage that only 230 sticks were tendered in evidence and admitted as Exh. P4. This is evident at p. 75 of the record of appeal.

Another complaint by the appellant is on the inconsistencies and contradictions in the testimonies of the prosecution witnesses. Despite acknowledging that minute inconsistencies and contradictions are normally inevitable in cases of this nature, she contended that the ones in the present case are such that they prove that the case was fabricated against the appellant. She relied on **Jeremiah Shemweta v. Republic** [1985] T.L.R. 228, in which the High Court held that contradictory evidence in the story of the prosecution

witnesses gives rise to some reasonable amount of doubt. The appellant pointed out the contradictions under reference as evidence regarding a witness who invited PW4, the independent witness, to witness the search. While PW1 claimed that it was him who called PW4, PW2 testified that he was the one who did it. Who should the Court believe? she queried. The appellant referred to another contradictory evidence in respect of the time she was searched. She submitted that while PW1 and PW3 are positive that the same was conducted at 1635 hours in the presence of PW4, PW4 himself testified that it was after 1700 hours. These contradictions, she contended. adds up to the earlier concerns by the appellant that the case was fabricated against the appellant. She implored us to so find and hold.

We have considered the contending arguments by the parties to this appeal on the inconsistencies and contradictions in the evidence by the prosecution witnesses. Indeed, the law in this jurisdiction is settled that only those inconsistencies and contradictions which go to the root of the matter will destroy the prosecution case. We have so decided in a number of our previous decisions. If we are asked to mention one, **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported), immediately comes to our mind. In that case, we held that minor contradictions, inconsistencies, or discrepancies do not affect the prosecution case because

they do not corrode the credibility of a party's case as does material contradictions, inconsistencies and discrepancies. In the present matter, there are inconsistencies and contradictions that, if it were not for the appellant's defence to the effect that the case against her was fabricated, and if it were not for the prosecution's failure to call Constatine Masumbuko, we would have taken them as minor and would have held that they did not water down the prosecution's case. We shall demonstrate further in the course of determining the issue on doubts in the prosecution case and thus leading to the question whether the case was proved beyond reasonable doubt to which we now turn.

The gravamen of the appellant's defence, at the trial and in the written submissions is that the case against her was fabricated. She ascribes the fabrication to her former boyfriend Constantine Masumbuko who had promised to manufacture a case against her as revenge for being impregnated by a another person when he was incarcerated for armed robbery. She also alleges that the prosecution case is marred with doubts that must be resolved in her favour. On our part, we think her complaint has some justification. We have reasons; one, it is in evidence that PW2 and PW3 arrested the appellant at the gate of the Traffic Police Station. The appellant testified that they did not arrest her there. After arresting her, PW2 and PW3 did not search her there. Neither did they take her to the nearby Traffic Police Station for that purpose. Instead,

they took her to the Central Police Station where they searched her in the presence of PW4. It is not made clear in evidence why the appellant was not searched where she was arrested. Neither is it stated why she was not taken to the nearby Traffic Police Station which was just fifteen paces away where she could be searched but resorted to go to the Central Police Station. The fact that the appellant denies ownership of the said brown handbag and its contents, and since PW4 did not witness the arrest but just witnessed the search, the doubts that the said handbag was with the appellant and whether it really contained the contents complained of become imminent.

The second reason is connected with the failure by the prosecution to call the said Constatine Masumbuko. We are of the considered view that, since PW2 mentioned Constatine Masumbuko, to be the informer who told him that the appellant had cannabis sativa in the handbag she was carrying, the said Constatine Masumbuko was a material witness for the prosecution and ought to have been called to prove the fact that the bag was owned by the appellant and that it contained cannabis sativa before her being taken to the investigation office at the Central Police Station. The said Constantine Masumbuko would have shed light on the appellant's complaint to the effect that she was framed. For the avoidance of doubt, we are aware that the law protects an informer. However, in the case at hand, the fact that the alleged informer was disclosed

during the trial, his status of being an informer was stripped off and so was his protection as an informer. Failure to call that material witness, left some doubts in the prosecution case unresolved. Those doubts, as our criminal law dictates, must be resolved in favour of the appellant. We have held in our previous decisions that failure by the prosecution to call a material witness, invites the Court to draw an inferences adverse to the the prosecution case – see: **Shilanga Bunzali v. Republic**, Criminal Appeal No. 600 of 2020 (unreported). In that case, the Court reproduced the following holding from its previous decision in **Aziz Abdallah v. Republic** [1991] T.L.R. 71 which we find worth recitation here:

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the case at hand, failure to call Constantine Masumbuko who allegedly knew the background to the commission of the offence and informed PW2 that the appellant was passing by the Central Police Station in possession of the alleged cannabis sativa, makes us doubt that the infraction to do so was not by

accident. Rather, it was calculated to hide his evidence which could perhaps be to the detriment of the prosecution case. That casts doubt which must be resolved in favour of the appellant. We are supported on this stance by what we held in **Esther Aman v. Republic**, Criminal Appeal, 69 of 2019 (unreported) in which, confronted with an akin situation, we held:

> *"... the said Saidi Amri Ramadhani was not called as a witness irrespective of being listed as one of the witnesses at the committal stage in order to clear the doubts on what had precipitated the enquiry in question in relation to the killing incident. To say the least, Said Amri Ramadhani was a material witness and the prosecution was under a prima facie duty to call him as he would have testified on material facts relating to the fateful incident. Since nothing was said if he was not within reach or could not be found, the Court is entitled to draw an inference adverse to the prosecution".*

In view of the foregoing discussion, we find and hold that failure to call Constantine Masumbuko is an ailment on the prosecution case which must be resolved in favour of the appellant. The conviction of the appellant by the trial court cannot be left to stand. So is its flanking sentence.

The ground on the unconstitutionality of the sentence will not detain us. We say so because, first, as rightly put by the learned Principal State Attorney, this is not a proper forum to discuss the constitutional point. In **Emmanuel Simforian Massawe v. Republic**, Criminal Appeal No. 252 of 2016 (unreported), there arose an akin argument. It was a criminal appeal in which the appellant complained to the Court for the High Court refusing him bail. Before this Court, the appellant challenged the act for being unconstitutional and relied on our then immediate previous decision in **The Attorney General v. Jeremia Mtobesya,** Civil Appeal No. 65 of 2016 (unreported) to buttress the argument. We held:

> *"The modus operandi taken by the learned counsel for the appellant in their oral and written submissions gives an impression as if the Court is dealing with a constitutional case which is exactly what is not. We wish to make it clear and emphasize that this is not a constitutional matter but rather a criminal appeal premised on the subject of bail. We have all good reasons to say so because, at the High Court level the issue was an application for bail and upon hearing both parties a decision focused on that point was given..."*

This is what happened in the case at hand. As the High Court in its decision did not sit as a constitutional court, the complaint by the appellant

challenging the sentence as being derogative of the constitution cannot stand. We find it misconceived and ignore it.

In the end, we quash the conviction and set aside the sentence of life imprisonment meted out to the appellant. We allow the appeal and order her immediate release from prison custody unless incarcerated for some other lawful cause.

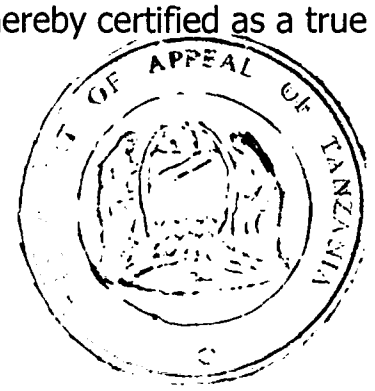
DATED at **MOSHI** this 24th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of August, 2023 in the presence of the Appellant who appeared in person, Mr. Philbert Mashurano and Mr. Innocent Exavery Ng'assi both learned State Attorneys for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL