IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 152 OF 2019

SOPHIA JOSEPH KIMARO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Amour, J.)

Dated the 25th day of April, 2019

in

Vide Criminal Session No. 67 of 2016

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JUDGMENT OF THE COURT

15th August & 01st September, 2023

MASOUD, J.A.:

The appellant, Sophia Joseph Kimaro, was on 11th December, 2014 charged with, convicted on 25th April, 2019 by the High Court, of the offence of trafficking in narcotic drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act. Cap. 95 R.E. 2002, and was as a result sentenced to life imprisonment. It was alleged that the appellant on 4th December, 2014 at Njoro ya Pepsi area within the Municipality of Moshi in Kilimanjaro Region, was found trafficking 12.5 Kg of prohibited drugs commonly known as khat.

The prosecution case at the trial relied on the evidence of eleven (11) witnesses which was supplemented by nine (9) exhibits. On the other hand, the appellant relied on her own sworn testimony in her defence. She also relied on PW3's police witness statement (Exhibit D1) to impeach the credibility of F 1157 DSSGT Hashim (PW3), a star witness of the prosecution, who was a jack of all trades in the allegations leading to the instant matter.

The substance of the prosecution evidence before the trial court was to the effect that on the fateful day of 4th December, 2014 at Njoro ya Pepsi area within the Municipality of Moshi in Moshi Region, the appellant was found selling khat. The evidence rested on the testimony of F 1157 DSSGT Hashim (PW3) who told the trial court that he received information from an undisclosed informer on the fateful day that there was a woman selling khat at the house belonging to Mama Aloyce (Mama Bosii). As a result, PW3 went to the scene of crime along with another police officer, one, DC Goodluck. He knew the place as he had surveilled it before based on information that he earlier received from the informer.

PW.3 testified that he entered the house along with DC Goodluck in which the appellant had already entered ahead of them. Once they were inside the house, the appellant offered to them for sale 2.5 bundles of substance suspected to be khat which he estimated to measure 2.5 Kg,. PW3 arrested the appellant there and then before they were joined by other police officers including WP 5317 DCL Mwajabu (PW10) who was assigned to take care of the

appellant. Consequently, independent witnesses, namely, Hamida Hussein Mwamba, a ten cell-leader, (PW7) and Lucy Peter Asenga (PW8) were called to witness a search which was conducted in the house and as result of which ten (10) more bundles of a substance suspected to khat were recovered from one bedroom of the house.

Therefore, a total of 12.5 bundles of the substance were seized by PW3 from the house (Exhibit P5), and accordingly, a certificate of seizure (Exhibit P4) was prepared by PW3 and signed by the independent witnesses although the appellant refused to sign. According to PW3, at the police station, he kept the seized substance at the exhibit room as the custodian of exhibits and recorded the cautioned statement of the appellant (Exhibit P3). The substance was latter taken to Government Chemist and Laboratory Authority (GCLA) where it was examined and confirmed, as testified by Elias Zacharia Mulima (PW1), to be khat weighing a total of 12.5 Kg, and a report to that effect was admitted as Exhibit P1.

The appellant, in all, denied to have been engaged in any way, in aspects related to trafficking, be it conveying, transporting, giving, supplying, presenting or keeping, and preparing or manufacturing drugs. In addition, in relation to the testimony of PW3, she denied to have offered to sale the seized substance to PW3 as alleged, and gave her story saying that she was at the scene helping her mother-in-law who was not well.

All of the assessors that the trial judge sat with were of the opinion that there were serious doubts that marred the prosecution case which meant that the charge could not be said to have been proved beyond reasonable doubt. Their opinion was reflective of several doubts that they entertained in the whole process leading to arrest, search and seizure and the prosecution of the appellant.

The assessors, in their opinion, singled out a number of concerns tainting serious doubts in the prosecution case. The concerns were reflective in a number of aspects which included, Exhibit P5 which was not consistent with what was allegedly seized and kept by PW3 as the custodian of exhibits, the fact that the police officers entered the house and actually started the search and arrested the appellant before the coming of PW7 and PW8, and the fact that E 5589 DCPL (PW5) took the seized substance to the GCLA without confirming its content and hence chain of custody was broken there and then, the fact that (PW3) was a jack of all trades in the whole process which raised issues of his impartiality and injustice to the appellant, and the fact that the substance was seized from Mama Calista Aloyce's place, she was neither arrested, nor interviewed, nor enlisted to be brought as a witness.

The trial judge analysed the evidence laid before him and unhesitatingly did not agree with the assessors' opinion. In his considered view, he was satisfied beyond reasonable doubt that the charge laid against the appellant was established beyond reasonable doubt. As earlier pointed out, the trial judge

proceeded to convict the appellant for the offence and sentenced her for life imprisonment.

In her memorandum of appeal, as well as the supplementary memorandum of appeal filed later, the appellant sought to impugn the decision of the High Court upon a number of grounds. As is on the record, the appellant, represented by Mr. Charles J. Mwanganyi, learned advocate, and the respondent Republic represented by Ms. Cecilia Mkonongo, learned Principal State Attorney, who was assisted by Mr. Henry Chaula, and Ms. Agatha Pima, both learned State Attorneys, argued and submitted extensively on the grounds of appeal clustering them based on their similarities and ease of arguments and submissions.

Indeed, looked at closely and as a whole, the grounds and the ensued rival submissions could conveniently be grouped in four clusters of complaint which attract three substantive issues for our consideration and determination in this appeal. The first cluster of substantive issue is on search and seizure of the substance confirmed subsequently to be khat. The second cluster of the substantive issue is on chain of custody of the seized substance and the resulting laboratory analysis of the substance. The third is on the disclosure of the nature of trafficking in respect of which the appellant was charged. And the fourth cluster is on proof of the charge laid against the appellant on the required standard.

The nature and context of the rival submissions on the first cluster was on the manner in which the search and seizure were conducted. Whilst Mr. Mwanganyi was of the view that the whole thing violated section 38 of the Criminal Procedure Act, Cap. 20 R.E 2022 (the CPA) in so far as the search was not emergency and was illegally conducted without a search warrant, Ms. Mkonongo was in brief contented that the search was an emergency as the prevailing circumstances and information received dictated so.

Clearly, the learned counsel in their submissions on this cluster were at one, correctly so in our considered view, that it is only an emergency search that under the law can be conducted without a search warrant. See **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019, and **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (both unreported). They were equally at one that in the instant case the search was conducted without search warrant, which as a result raises a question as to whether or not the search was, in the circumstances of the instant case, an emergency search prescribed under section 42 of the CPA.

In other words, and with reference to the instant case, the question is whether the search which was conducted at the house known to belong to Mama Calista Aloyce (Mama Bosii) on 4th December, 2016 in the afternoon hours leading to the seizure of substance subsequently confirmed to be khat falls under the exceptions provided for under section 42 of CPA, and if it does not, whether the search in as much as it was illegally conducted it affected the

credibility of the search. In relation to this issue we are fortified by what we held in **Shabani Said Kindamba** (supra) that:

> *"Since the general rule under the CPA is that search of a suspect shall be authorized by a search warrant unless it falls under the exceptions provided for under section 42 of the CPA, and since the instant case does not fall under any of the exceptions, the search was illegally conducted".*

The record before us is apparent that the disputed search was conducted on 4th December, 2016 in the afternoon hours. It was as such conducted upon information received on the same day by PW3 in the afternoon hours and immediately, thereafter, PW3 disembarked with one, DCPL Goodluck without a search warrant to the scene of crime where they subsequently searched the house, arrested the appellant and seized the substance.

However, contrary to what Ms. Mkonongo was saying in her submissions in which she wanted to impress us that the search was on emergency because the information received was short notice and was not precise as to the location, and the suspect targeted, the record of appeal at pages 66, 75 and 156 is in the testimony of PW3 and PW10 loud and clear that PW3 had prior information about the suspect, the house, the owner of the house and the very door of the house in which the suspected substance later confirmed to be khat was being sold.

We recalled that in the testimony of PW3 which was supported by PW10 and which we revisited herein above, PW3 told the trial court under oath that he had an opportunity to see the girl (the appellant) when he surveilled the house of one Mama Calista Aloyce on 3rd December, 2014 before the day (i.e. 4th December, 2014) of the search. It is to say the least not in the testimony of PW3 that despite the information received, the search was nonetheless emergency. There was therefore nothing from his testimony suggesting that the circumstances to the effect that the search was indeed an emergency.

It is in this regard not surprising that Exhibit P.4 was purportedly styled not only as "a search warrant" but also as "a certificate of seizure" in Kiswahili "*HATI YA UPEKUZI NA KUKAMATA/KUCHUKUA VIELELEZO.....*" Notwithstanding such styling and labeling, it remained in our view a certificate of seizure as it does not qualify as a search warrant issued under section 38(1) of the CPA. It is clear to us that with all such information there was no justification for PW3 to embark on carrying out the search in the house which was neither owned nor occupied by the appellant but by Mama Calista Aloyce without involving her and without warrant as is evident in Exhibit P4.

Coupled with this search which was conducted without search warrant whilst it was not an emergency is the fact that the police officers were, contrary to Police General Order 226, regulation 17(b), inside the house before the independent witnesses, namely, PW7 and PW8, something which the appellant complained about in her testimony and hence one of the points of contention

in this appeal. A close look of the independent witnesses' testimony, there is no gainsaying that the appellant was not fully involved in the search processes that followed after their arrival. We are mindful also that there were many police officers as was also affirmed by the testimony of PW3 without their role being specified and while one of them at some point was left to get out of the house and come back after a while without any restriction whatsoever. It is no wonder that the appellant refused to sign the certificate of seizure admitted as Exhibit P4.

With such observation and record, it is our finding that the search conducted in the instant case should have been authorized by a search warrant since it did not fall within the purview of exceptions provided for under section 42 of the CPA which would have made it emergency. As we held in **Shabani Kindamba** (supra), we are in this case satisfied that the foregoing anomalies compounds the illegality of the search in this case.

The manner in which Exhibit P5 was recovered from the house undisputedly belonging to Mama Calista Aloyce, and from a room, according to Exhibit P4, occupied by one Bosco (Bosii) while none of them was arrested or involved in the search nor charged is not free from doubts which must be resolved in the appellant's favour. The doubt becomes serious considering that the exhibit that was produced in the trial court as Exhibit P5 was at variance in terms of the quantity of bundles of the substance that was seized from the house as a result of the illegal search and which were described to have been

wrapped in particular manner inconsistent with what was shown and tendered at the trial which was just 10 bundles instead of 12.5 bundles. Yet, there was no cogent evidence plausibly explaining the significant difference noted, other than simple sweeping assertion that the other bundles had simply wilted into dust which answer begs a question as to why it was not equally so to the rest of the remaining bundles since they were stored and kept in the same place.

For reasons which would become clear subsequently, we undertake to confine our deliberation on two matters. The firstly, the evidence of PW3, a star witness of the prosecution, and secondly, the objected cautioned statement of the appellant which were from page 546- 550, and 575 to 578 both heavily relied upon by the trial court in grounding conviction.

As to the evidence of PW3 while the appellant maintained that the evidence of PW3 at the trial court was materially inconsistent with the contents of the witness statement (Exhibit D1) recorded when his mind was still fresh about the incident, the respondent was of the view that although there were inconsistences and contradictions, the same were minor and did not go to the root of the case. We agree with the submission of the appellant that there were indeed material contradictions in the witness statement of PW3 (Exhibit D1) when compared to the oral testimony of PW3 before the trial court.

The testimony of PW3 from pages 66 line 22 up to page 67 line 14 of the record of appeal is materially different from his police statement (Exhibit D.1).

Whilst the testimony is to the effect that the appellant offered to PW3 for sale the substance proved to be khat, the witness statement did not record any statement to that effect.

The testimony is to the effect that the appellant offered to sell the substance to PW3 who was accompanied by DCPL Goodluck. The appellant is said to have asked them as to what they wanted that is "*mwasemaje?*"(what do you want?), and PW3 replied that they were in need of a luggage that is "*Tunahitaji mzigo*". PW3 testified further that the appellant inquired from them as to how much they wanted, that is," *zaruba ngapi*?" And that, thereafter, PW3 requested the appellant to allow her to have a look at the substance, that is, "*Naomba nione*" of which she did, according to PW3's testimony. The statement recorded at the police by PW3 as soon as the incident occurred did not have anything like the appellant making an offer for sale which in this case is the root of the case. Indeed, despite such material contradictions as there were no consideration made to Exhibit D.1 in relation to the testimony of PW3, the trial court was at page 575 and 476 of the record of appeal of the finding that the appellant was indeed according to the evidence of PW3 selling the substance and that such evidence was corroborative to the confessional evidence exhibited by Exhibit P.3. We will revert to this after a while.

Similar patterns of contradictions are apparent when the testimony of PW3 is compared with the contents of Exhibit P4 prepared by PW3. Unlike in the latter in which PW3 stated that the substance was seized from Bosco Abeid's

room in the house belonging to Calista Aloyce, he admitted in his testimony at page 159 of the record of appeal that he does not know the owner of the sitting room and the bedroom.

In view of the contradictions found, we are satisfied that they go to the root of the case. They cannot be described as minor as suggested by the respondent. We cannot therefore overlook them. We are thus satisfied that the evidence of PW3 was tainted and cannot be believed because his statement to the police materially varied with what PW3 testified at the trial to the effect that the appellant offered for sale the substance and was arrested as she reached it on the floor for PW3 and DCL Goodluck. In our finding, we are guided by our previous decision in **Alberto Mendes v. Republic**, Criminal Appeal No. 473 of 2017 (unreported). In that case, we were confronted with similar issue as is in this appeal. In our deliberation, we were satisfied in that statements of some witnesses recorded at the police materially differed with oral evidence the witnesses gave in court. We were in therefore in that case as is in this appeal satisfied that such contradictions could not be termed to be minor as they affected the root of the matter.

With regard to the confession evidence, the appellant challenged it contending that the trial court erroneously acted on it while it was disputed by the appellant. It is indeed not disputed that the appellant at the trial court denied the statement contending that she was forced to make it. It is trite law that confessional evidence which has been retracted or repudiated cannot be

acted upon to ground conviction unless it is corroborated by independent evidence. (See: **Ali Salehe Msutu v. Republic** [1980] TLR 1, **Shihobe Seni & Another v. Republic** [1992] TLR 330, and **Muhidin Mohamed Lila @ Emolo and Others v. Republic**, Criminal Appeal No. 443 of 2015- unreported).

As we have found that the evidence of PW3 is tainted and cannot be believed because it varied with what was earlier stated in the witness statement admitted as Exhibit D1. Thus, the evidence of PW3 which the trial judge found that it was corroborative to the confession evidence is as we have found herein itself deficient and cannot be used to corroborate the disputed confession. See: **Muhidin Mohamed Lila @ Emolo** (supra).

Considering the doubts in the prosecution case emerging from the position we have taken on the grounds of complaints on search and seizure, and proof of the case beyond reasonable doubt, we cannot but hold that the said doubts are in the circumstances to be resolved in the favour of the appellant. Our conclusion is therefore that the prosecution failed to prove the case beyond reasonable doubt. The findings suffice to dispose of the appeal. We need not consider the other grounds of appeal which are on the record raised by the appellant.

In conclusion, we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant's immediate release from prison unless she is being held for another lawful cause.

DATED at **MOSHI** this 01st day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 01st day of September, 2023 in the presence of Mr. Mussa Mziray Holding brief for Mr. Charles Mwanganyi for the Appellant and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL