IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 52 OF 2020

JONAS BONIPHAS MASSAWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwenempazi, J.)

dated the 23rd day of December, 2019

in

Criminal Sessions Case No. 50 of 2016

.....

JUDGMENT OF THE COURT

30th November & 8th February, 2023

KIHWELO, J.A.:

In the quest for justice, the appellant, Jonas Boniphas Massawe has knocked the doors of this Court seeking to challenge the decision of the High Court of Tanzania at Arusha (Mwenempazi, J.) in Criminal Sessions Case No. 50 of 2016 in which the appellant was found guilty of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) 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) (No.2) Act, No. 6 of 2012 (the Act) and consequently, he was sentenced to life imprisonment.

Briefly, the prosecution case which was believed by the learned trial Judge was to the effect that on 23.08.2013 at Longido Police Station check point area within Longido District, in Arusha Region the appellant was apprehended trafficking narcotic drugs namely "cannabis sativa" commonly known as "Bhangi" weighing 320 kilograms valued at Tanzanian Shillings Thirty-Two Million (TZS. 32,000,000.00) only in a motor vehicle, Make Toyota Noah with Registration No. T. 969 BBY (the vehicle).

To prove its case, the prosecution produced nine (9) witnesses whose evidence was supported by a host of seven (7) pieces of documentary and physical exhibits. According to the witnesses' testimony, on the fateful day at around 5:30 am WP 1736 SGT Rukia who testified as PW1, while at Longido Police Station check point area as in charge of that shift, along with other police officers, No. E. 6514 DC Raphael (PW2), DC Majaliwa, DC Kiraka and DC Anzelim they apprehended the appellant who was travelling from Arusha towards Namanga in the motor vehicle. Because they suspected the appellant whose companion fled upon being stopped by the police, they took him along with the vehicle to the police station and upon informing the

Officer Commanding the Criminal Investigation Department (OC-CID) they searched the vehicle and discovered eleven (11) polythene bags containing plant leaves which they suspected to be contraband. To that effect, a seizure certificate which was tendered and admitted in evidence as exhibit P1 was filled and signed by those who were present at the scene including the appellant. The vehicle which was described by PW1 and PW2 before the trial Court was also seized and later tendered and admitted in evidence as exhibit P2.

It was further testified before the trial Court that, PW2 took exhibit P1 and exhibit P2 to No. F. 2233 DC Raymond (PW6) the exhibit keeper who was instructed by the Regional Crime Officer (RCO) to receive the exhibits from PW2 and upon receipt, PW6 entered the exhibits in the exhibit register and later communicated with Erasto Lawrence (PW4) the Chemist from Government Chemist Arusha Zone and the duo went to Lucky Weighing Bridge where Hamis Juma (PW8), the weight measure officer weighed the suspected contraband in the presence of PW4 and PW6 and found out that its total weight was 320 kilograms. After weighing the eleven (11) polythene bags with contraband they took them back to the police station where they were kept by PW6 while PW4 took few samples for analysis purposes which

were labeled and sealed in an envelope before they were taken to the Chief Government Chemist by PW6 for analysis by Theresia Kahatano (PW5) who after conducting both preliminary and confirmatory analysis came to the conclusions that the suspected contraband was actually cannabis sativa (Bhangi). PW5 filled the report which was tendered and admitted in evidence as exhibit P4. Later, exhibit P4 was taken to Kenneth James Kaseke (PW3) the then Commissioner of the Drug Control Commission for valuation and upon valuation PW3 found out that the total value of the 320 kilograms of said narcotic drugs was Tanzanian Shillings Thirty-Two Million (TZS. 32,000,000.00) only. He then prepared a valuation report which was tendered and admitted in evidence as exhibit P3.

According to PW6, as the police store was running out of space it was imperative that exhibit P1 was to be destroyed and after due process exhibit P1 was destroyed and an inventory form (P.F. 12) was filled which was later tendered and admitted in evidence as exhibit P5. On his part, D 3781 D/SGT Emmanuel (PW7) recorded the cautioned statement of the appellant which was tendered and admitted in evidence as exhibit P6.

The appellant refuted the accusation and totally disassociated himself with the offence he stood charged, in his spirited defence, he testified that

he was a mere passenger in the vehicle as he was travelling from Arusha to Namanga and that the driver of that vehicle who would seem to know more about the narcotic drugs fled immediately upon being stopped at the police check point. He further disassociated himself with the narcotic drugs he was caught with and he further claimed that he was tortured by the police in order to mention the owner of the narcotic drugs and that he signed the cautioned statement merely in order to escape from torture.

At the conclusion of the trial, the High Court was impressed by the prosecution case, and in the end, it was satisfied that the appellant committed the offence and found him guilty as charged. In consequence, the trial court convicted and sentenced the appellant as hinted earlier.

The appellant's dissatisfaction with the decision of the High Court is expressed in a memorandum of appeal comprising six grounds of appeal which was lodged in Court on 25. 11. 2022 that replaced the memorandum of appeal comprising twelve (12) grounds of appeal which was earlier on lodged in Court on 09.09. 2021 but was abandoned by the appellant at the hearing of this appeal. The grounds can be paraphrased as follows;

1. *That, the trial court erred in law and fact when it erroneously relied on exhibit P4 which is unreliable, contradictory and whose chain of custody was not established;*
2. *That, the trial court grossly erred in law and fact when it convicted and sentenced the appellant in serious violation of section 38 (3) of the Criminal Procedure Act;*
3. *That, the trial court erred in law and fact by convicting and sentencing the appellant in a case which was not proved beyond reasonable doubt;*
4. *That, the trial court erred in law and fact when it relied on exhibit P5 to convict and sentence the appellant;*
5. *That, the trial court erred in law and fact to convict and sentence the appellant while material witnesses for the prosecution were not summoned to testify; and*
6. *That, the trial court erred in law and fact when it relied on exhibit P7 to convict the appellant.*

When, eventually, the matter was placed before us for hearing on 30. 11.2022, the appellant appeared in person, unrepresented, while on the adversary side, the respondent Republic was represented by Ms. Janeth Sekule, learned Senior State Attorney who teamed up with Ms. Grace Madikenya and Ms. Janeth Masonu both learned State Attorneys who bravely resisted the appeal.

When invited to address us, the appellant being a lay person not conversant with the law prayed to adopt his six (6) grounds of appeal and the written submission which were both filed in Court on 25.11.2022 and preferred for the learned State Attorney to respond and he would rejoin if need to do so would arise.

Starting with ground one, the appellant challenged the credibility of exhibit P4 the report from the Chief Government Chemist which was weighed by PW8 a weight measurement officer instead of a Government Chemist and referred us to pages 113 and 114 of the record of appeal and argued that, it was contrary to the law to allow PW8 who is not a Government Chemist to have weighed the narcotic drugs. Reliance was placed on the case of **Omary Said @ Athuman v. Republic**, Criminal Appeal No. 58 of 2022 (unreported). The appellant, therefore rounded off his submission by arguing that, it was wrong for the trial court to have relied upon exhibit P4 which was dented by irregularities committed during the weighing process. He also contended that, the chain of custody of exhibit P4 was not watertight as required by law from the date of his arrest to the period when it was tendered at the trial.

In further support of the appeal the appellant faulted the High Court for convicting the appellant while the search and seizure exercise of the appellant's motor vehicle that led to the discovery of the narcotic drugs was not supported with receipt which is a clear violation of the mandatory requirement of section 38 (3) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) and therefore making the credibility of the certificate of seizure exhibit P1 questionable. He referred us to the testimony of PW2 at pages 63 to 67 of the record of appeal and cited our previous decisions in **Andrea Augustino @ Msigara and Another v. Republic**, Criminal Appeal No. 365 of 2018, **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 and **Seleman Abdallah and 2 Others v. Republic**, Criminal Appeal No. 384 of 2008 (all unreported) in which we emphasized the importance of issuing receipt of the seized items.

Arguing in support of the third ground of appeal, the appellant faulted the High Court for convicting the appellant while the case before it was not proved beyond reasonable doubt. Elaborating, he argued that, the account of PW6 and PW8 was contradictory and inconsistent in that, while PW6 testified that the weight of the vehicle was 1440 kilograms as obtained from the registration card, PW8 testified that the weight of the vehicle was

obtained after offloading the 11 polythene bags and measuring the empty vehicle. In his zealous submission he argued that, the weight of the narcotic drugs which is an essential ingredient in the circumstances above was not proved beyond reasonable doubt.

The appellant argued ground four of the appeal very briefly and his argument was to the effect that, the High Court erred to convict the appellant relying on exhibit P5 which was tendered by PW6, but quite unfortunate, the said exhibit 5 was obtained contrary to the provisions of the law, since the reason assigned for the disposal of the narcotic drugs is not within the parameters of the law. He referred us to the testimony of PW6 at page 89 of the record of appeal, where the reason for the disposal was assigned to be the store at the police station running out of space. He went on to submit that, since the reason for the disposal was not in line with the Police General Orders (PGO) which are promulgated under section 7 (2) of the Police Force and Auxiliary Services Act, [Cap 322 R.E. 2002] particularly paragraph 25 of the PGO. On that basis, he implored us to expunge exhibit P5 from the record. In support of his proposition he paid homage to the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 (unreported) at pages 22 and 23.

In support of ground five of the appeal the appellant contended that the High Court erred in convicting the appellant while the prosecution did not produce material witnesses to testify. He referred us to page 58 of the record of appeal where at the committal stage of the proceedings the respondent Republic referred to No. F. 2231 CPL Kilaka as one of the witnesses the prosecution intended to call to testify. The appellant, argued further that, quite unfortunate and for an obscure cause this witness who was present during the search exercise and signed the certificate of seizure exhibit P1 as a witness did not testify. He further submitted, while referring to page 66 of the record of appeal that, the OC CID who also signed exhibit P1 was not produced by the prosecution to testify and therefore implored upon us to draw an adverse inference.

Finally, the appellant argued the sixth ground of appeal by faulting the High Court for relying on exhibit P6 the cautioned statement of the appellant in contravention of section 198 (1) of the CPA. Illustrating, the appellant contended that the record of appeal at page 183 is conspicuously clear and suggestive that the learned trial Judge believed and relied upon exhibit P6 which was produced in court by PW7 and admitted in evidence, while PW7 was not sworn during trial within trial contrary to the mandatory requirement

of section 198 (1) of the CPA. He therefore urged us to discount the evidence of PW7 from the record.

Ms. Sekule in her reply to the first ground of appeal, was fairly brief. She argued that there was sufficient evidence to prove that the chain of custody of exhibit P4 was not broken. She contended that there is clear evidence on record by both PW4 and PW8 at pages 77 and 113 of the record of appeal respectively that, the narcotic drugs were packed in 11 polythene bags and was taken to lucky weighbridge where PW8, the weight measurement officer, weighed and found out that the weight of the narcotic drugs was 320 kilograms. She was at one with the learned trial Judge who relied on exhibit P4 to convict the appellant. She therefore argued that the complaint on credibility of exhibit P4 is baseless and therefore should be dismissed.

Turning to the second ground of appeal, Ms. Sekule argued that, the prosecution prepared a seizure certificate exhibit P1 which was properly filled and signed by the respective parties who were present including the appellant himself. She argued further that, however, the provision of section 38 (3) of the CPA and the entire CPA does not provide for the specific format of the receipt envisaged in that provision and she went on to submit that, in

the circumstances, the certificate of seizure is sufficient to prove that the appellant was found in possession of exhibit P1 and the absence of the receipt was inconsequential and therefore it does not affect the substance of exhibit P1. To facilitate the appreciation of her proposition, she referred us to the case of **Jibril Okash Ahmed v. Republic**, Criminal Appeal No. 331 of 2017 (unreported). The learned Senior State Attorney submitted that this ground of appeal has no merit.

Responding specifically to the complaint that there was inconsistences and contradictions on the testimonies of PW6 and PW8 as regards the weight of the vehicle, Ms. Sekule argued that, the case against the appellant was proved to the hilt as the appellant was found trafficking in narcotic drugs and this was proved by the prosecution witnesses in particular, PW1, PW2, and PW7 at pages 60, 65 and 111 of the record of appeal respectively, where they all explained the circumstances under which the appellant was apprehended. She further contended that, according to exhibit P6, the cautioned statement of the appellant, it is conspicuously clear that the appellant confessed to the charge and this was also reflected in the impugned judgment at page 183 of the record of appeal as well as exhibit P4 which proved that what the appellant was caught with was actually

narcotic drugs. She further submitted that, the chain of custody of exhibit P4 was intact and this was also adequately addressed by the learned trial Judge at page 186 of the record of appeal.

The learned Senior State Attorney in response to the complaint that the High Court erred in convicting the appellant by relying on exhibit P5, the inventory form which is alleged to have been prepared in violation of the PGO particularly paragraph 25, she argued that, looking at the impugned judgment as a whole exhibit P5 was not relied upon by the learned trial Judge to convict the appellant, but rather, it was the totality of the evidence on record that the appellant was found guilty. Ms. Sekule argued that this ground too has no merit, as such, she prayed that it has to be dismissed.

In relation to the complaint that material witnesses for the prosecution were not produced to testify referring to No. F. 2231 CPL Kilaka and the OC CID for Longido, Ms. Sekule was very brief and argued that, the prosecution witnesses who appeared to testify were able to prove that the appellant committed the offence of trafficking in narcotic drugs which he was charged with. She went on to submit that PW1 is the one who filled exhibit P1 and that No. F. 2231 CPL Kilaka was a mere witness. She further argued, while citing section 143 of the Evidence Act [Cap 6 R.E. 2019] (Evidence Act) that,

no particular number of witnesses is required to prove a case. Reliance was also placed on the case of **Goodluck Kyando v. Republic** [2006] TLR 364.

Last to be addressed by Ms. Sekule is ground six on the complaint that exhibit P6 was erroneously admitted because PW7 was not sworn while testifying. Ms. Sekule argued that, PW7 at page 95 of the record of appeal was sworn while giving testimony and at page 96 of the record of appeal was warned that he was still under oath. She went further to submit that, in any case exhibit P6 was not the sole evidence upon which the appellant was convicted. Upon being prompted by the court on whether the learned trial Judge warned himself before relying on exhibit P6 to convict the appellant, the learned Senior State Attorney admittedly argued that the learned trial Judge did not warn himself before relying on exhibit P6 to convict the appellant. However, she was of the strong contention that, the failure was not prejudicial to the appellant as it did not occasion any miscarriage of justice.

In rejoinder the appellant did not have anything useful to submit aside from maintaining his innocence and prayed that the appeal be allowed and he be set free.

We have anxiously examined the evidence on record and weighed the competing arguments by the parties to this appeal and we shall now proceed to determine the appeal and in so doing, we propose to discuss the appeal in a pattern preferred by the parties.

We are cognizant that sitting as a first appellate Court, we are entitled under rule 36(1)(a) of the Tanzania Court of Appeal Rules, 2009 to re-evaluate the evidence afresh and arrive at our own finding bearing in mind that as an appellate court we never saw the witnesses as they testified. See for instance, **Pandya v. R** [1957] EA 336, **Marmo Slaa Hofu and Others v. Republic**, Criminal Appeal No. 246 of 2011, **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 and **Slahi Maulid Jumanne v. Republic,** Criminal Appeal No. 292 of 2016 (all unreported). We will therefore, be guided by this principle in the course of determination of this appeal.

We begin with ground one in which the appellant is faulting the credibility of exhibit P4 only on account that PW8, the weight measurement officer, weighed the narcotic drugs while he was not a Government Chemist. Looking at the evidence on record by both PW4 and PW8 who testified how the narcotic drugs were packed in 11 polythene bags and taken to Lucky weighbridge where PW8 weighed and found out that the weight of the

narcotic drugs was 320 kilograms, we think this should not detain us. The appellant was charged for trafficking in narcotic drugs and the prosecution produced witnesses to prove that the appellant was found trafficking in narcotic drugs and the same were analyzed and proved to be narcotic drugs the fact which the appellant did not dispute. We therefore, find considerable merit in the submission by the learned Senior State Attorney that, the learned trial Judge was undeniably right to convict the appellant since PW8 being a weight measurement officer, was the most appropriate person to weigh the 11 polythene bags in the circumstances of the case before us and not the Chief Government Chemist who measured the weight of samples sent for laboratory analysis. We therefore, find that this ground has no merit.

We will next deliberate on the second ground of appeal in which the bone of contention between the parties is non-compliance with section 38 (3) of the CPA. For the better understanding of the legal requirement to issue receipt upon seizure, it is desirable to reproduce section 38 (3) of the CPA. It reads:

> *"38.-(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the*

owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".

Quite clearly, the provision excerpted above imposes an obligation upon the officer who seizes anything upon conducting search, to issue receipt to the owner acknowledging the seizure. Upon reviewing the evidence on record, we were unable to see any receipt that was issued in terms of section 38 (3) of the CPA and the appellant sought to move the Court to expunge exhibit P1 on account of the absence of the receipt. However, the learned Senior State Attorney zealously argued that, although the law provides for the issuance of a receipt but there is no prescribed format of that receipt and went further to argue and rightly so, in our considered opinion that, failure to issue receipt is inconsequential and did not affect the admissibility of the seizure certificate.

Luckily, this situation is not novel. In the case of **Jibril Okash Ahmed** (supra) in which the Court was faced with an analogous situation, we had the following to say;

"We however, don't think that such an anomaly affects the substance of the seizure certificate. The

omission or contravention is minor and, legally speaking, cannot invalidate the seizure certificate or its admissibility or even cause it to be expunged from the record. On that we are reinforced by our finding in the case of ***Nyerere Nyague v. Republic****, Criminal Appeal No. 67 of 2010 where we stated that, it is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question".*

In light of the above position of the law, we think, with respect, that, the learned Senior State Attorney was correct that, the absence of the receipt was inconsequential and therefore it did not affect the substance of exhibit P1. Therefore, this ground fails.

Regarding ground three on the alleged contradictory evidence of PW6 and PW8 in relation to the weight of the narcotic drugs which the appellant claimed not to have been proved beyond reasonable doubt, this ground too should not exercise our mind. After reevaluating the evidence on record, we discern that the learned Senior State Attorney was undeniably right to submit that, the case against the appellant was proved to the hilt as the appellant was found trafficking in narcotic drugs and this was proved by PW1, PW2

and PW7 and that there was no contradiction between the evidence of PW6 and PW8 as we hinted above.

We are of the further view that, even if there was any contradiction between the evidence of PW6 and PW8 in relation to the weight of exhibit P2, there are several principles that govern testimony of witnesses which contain inconsistences and contradictions. **One**, the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether the inconsistences and contradictions are minor or whether they go to the root of the matter. See, for example **Mohamed Said Matula v. Republic** [1995] TLR 3. **Two**, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See, for example **Said Ally Ismail v. Republic**, Criminal Appeal No. 214 of 2008 (unreported). **Three**, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition, such as, shock and horror at the time of the occurrence. Minor contradictions or inconsistences on trivial matters which do not affect the case of the prosecution should not be made grounds on

which the evidence can be rejected in its entirety. See, for example **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 (unreported).

In our considered opinion, there was no contradictions between PW6 and PW8 as they both testified the weight of exhibit P2 to be 320 kilograms. This ground too has no merit and therefore dismissed.

Turning to ground four of the appeal, in our considered opinion, it should not detain us much as the learned Senior State Attorney argued and rightly so, in our mind, that upon scrutiny of the impugned judgment as a whole, exhibit P5, the inventory form was not the basis of the appellant's conviction but rather, the appellant was convicted on account of the totality of the evidence on record. This ground lacks merit and is dismissed.

In relation to ground five in which the appellant is challenging the failure to produce some prosecution material witnesses to testify, it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. The duty of the prosecution to prove the case beyond reasonable doubt is universal. In **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not

statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another v. Republic** [1993] TLR 219 the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

This is a universal standard in criminal trials and the duty never shifts to the accused. In our view, this does not depend upon the number of witnesses called to testify as stated in section 143 of the Evidence Act, but rather, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason for not believing a witness. In other words, what is important is the credibility and reliability of the evidence and not the number of witnesses called on to testify. See, **Goodluck Kyando** (supra). We think, in our re-evaluation of the evidence on record the eight prosecution witnesses sufficed to prove the case against the appellant, and therefore, No. F. 2231 CPL Kilaka and OC CID Loliondo although material witnesses for the prosecution but their failure to be called to testify did not affect the prosecution case which was proved beyond reasonable doubt. This ground therefore, has no merit hence it is dismissed.

Finally, we turn to determine ground six whose basis of complaint is that, exhibit P6, was erroneously admitted because PW7 who was not sworn while testifying. Upon re-evaluating the evidence on record, we discern that this complaint, as rightly argued by the learned Senior State Attorney, has no merit. To demonstrate what transpired at the trial, we wish to let PW7's testimony appearing at pages 95 and 96 of the record of appeal paint the picture.

At page 95 after the coram the record reads;

> *"**PW7:** D 3781 **Seu** Emmanuel of Longido, Police Officer, **Ngurime,** 35 years, Christian **Sworn and states** as follows; "*

At page 96 during trial within trial when PW7 was testifying the records reads;

> *"PW1: D3788 D/SGT Emmanuel **warned to remain in (sic) oath.**"*[Emphasis added]

We have emboldened the excerpt above purposely to demonstrate that, it is conspicuously clear that, PW7 was sworn and under oath when he produced exhibit P6, this ground has no merit and therefore dismissed.

When all is said and done, we find that the evidence on record is incompatible with the innocence of the appellant and incapable of any other reasonable explanation other than of the guilt of the appellant. We are therefore satisfied, like the learned trial Judge, that the prosecution proved the case beyond reasonable doubt. For the above reasons, we find the appeal devoid of merit. We accordingly dismiss it.

DATED at **DAR ES SALAAM** this 6th day of February, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 8th day of February, 2023 in the presence of Mr. Jonas Boniphas Massawe counsel for the Appellant and Mr. Tony Kilomo learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL