IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: KEREFU, J.A., RUMANYIKA, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 624 OF 2021

ATHUMANI MOHAMED NYAMVI @ ISMAIL ADAMU .....1ST APPELLANT

AHMAD SAID MOHAMED @ HEMED SAID.....2ND APPELLANT

MAUREEN AMATUS JOAKIM LIYUMBA.....3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania,

at Mtwara)

(Arufani, J.)

dated 29th day of November, 2021

in

Criminal Sessions Case No. 25 of 2019

JUDGMENT OF THE COURT

28th May & 11th June, 2024

RUMANYIKA, J.A.:

In the High Court of Tanzania at Mtwara (the trial court), Athumani Mohamed Nyamvi and Ahmad Said Mohamed, the 1st and 2nd appellants respectively, and a lady who is not a party to the appeal, were charged together and jointly with two counts of Trafficking in Narcotic Drugs, contravening sections 16 (1) (b) (i) of the Drugs and Prevention of Illicit

Traffic in Drugs Act [Cap. 95 R.E. 2002] (the Act). For the first count, it was alleged that on 12th January, 2012, at Mchinga II Village in the District and Region of Lindi, the appellants jointly did traffic narcotic drugs namely, heroin hydrochloride weighing 11,044.30 grams valued at TZS. 496,993,500.00. With regard to the 2nd count it was alleged that at the same place they did traffic in drugs namely, heroin hydrochloride and cocaine hydrochloride weighing 200,531.40 grams of cocaine mixed with heroin hydrochloride worth TZS. 9,023,913,000.00. The charge, being read to them, the appellants denied it. Nonetheless, after full trial, they were convicted as charged and sentenced to save imprisonment for twenty years save for the said lady who was acquitted. This explains why she is not a party to this appeal. The appellants received custodial sentences of twenty years for each count, each. Also they were ordered to pay fines of TZS. 745,490,250.00, and TZS. 13,535,869,500.00 for the two counts respectively. Aggrieved, the appellants are before the Court contesting the trial court's decision.

The background to the appeal is fairly straight forward. The prosecution lined up ten witnesses to prove the case. All began with SSP Salimin Shelimoh (PW10), a police officer from the Anti-Drug Unit (ADU)

Dar es Salaam. He lent from a whistleblower that, a consignment of drugs would be offloaded at Kunduchi Dar es Salaam by ship from South Africa, to be received by one Ally Hatibu @ Shikuba. Some investigative arrangements for the arrest of the culprits were made. However, it transpired at a later stage that the destination would now be Mchinga coast in Lindi District instead of Kunduchi. And that thereafter, the drugs will be transported to Dar es Salaam by a motor vehicle with Registration No. T 921 BPY Land Cruiser VX (the motor vehicle). Acting on this information and without much ado, the policemen arrived at Lindi Central Station. They were joined by S/Sgt Ramadhani (PW4) and D/sgt Salim (PW7) strengthening the convoy. It was also said that, on his arrival in Dar es Salaam from South Africa, the 1st appellant had picked his girlfriend one Maureen to Lindi and rented Room No. 104 at Lindi Oceanic Hotel (the hotel). According to the respective hotelier one Nestory Majaliwa (PW6), the 2nd appellant brought the couple there on 10th January, 2012 by the car. Following up the matter closely, the policemen including SSP Neema Andrew Mwakajinga (PW3), PW7 and PW10 found the 2nd appellant at the hotel aboard the car, before its engine had got to a complete stop. Further, it was alleged that, when the 2nd appellant saw the policemen coming towards his way, he took to his heels, abandoning the car there. However,

before he went far, he fell down and was apprehended. He told the arresting officers that there were drugs being stored at the house of Pendo Cheusi who is his own mother at Mchinga II. And that the 1st appellant and girlfriend are in Room No. 104 in the hotel. The car and its registration card which is in the name of Yusuph Rutengwe were admitted as exhibits P11 and P7 respectively. Led by the said hotelier, the policemen found the 1st appellant and the girlfriend in the room on 12th January, 2012 at about 03:00 hours, as directed by the 2nd appellant. From that room, the policemen seized five mobile phones (exhibit P10), three belonged to the 1st appellant and the other two belonged to his girlfriend. Also, they retrieved and seized the 1st appellant's air ticket for Dar es Salaam to Mtwara (exhibit P9), fifty (50) South African Rand and 12,000 USD (exhibit P8). The corresponding certificate of seizure was executed by PW6, the 1st appellant and his girlfriend were locked up at Lindi Central Police Station while the 2nd appellant who was under arrest led PW10 and fellow police officers to Mchinga II to his mother's house. There, the policemen conducted a search which was witnessed by the local cluster leader one Said Yusuph Kingo (PW5) and one S/Sgt Salim. Nine blue plastic containers (exhibit P4) were recovered from the house containing 210 packets of substance in a form of powder (exhibit P2). They turned out to be narcotic

drugs. Later on, at Lindi Central Police Station, the said packets were re-counted in the presence of the appellants and the said Upendo Cheusi. The said containers were accordingly labeled and transported to Dar es Salaam, for laboratory examination. At this stage, the appellants and co- suspects were left back at Lindi Central Police Station. On his arrival in Dar es Salaam, PW10 handled over the said containers to (PW3) who labeled, packed and sealed the packets in the presence of some police officers. PW3 and PW10 took the exhibits to the Government Chemist on 13th January, 2012 which, were received on 16th January, 2012. Bertha Mamuya (PW1) examined it and established the said substance to be narcotic drugs. She found that, the eleven packets contained heroin, while the other 199 packets contained cocaine and heroin hydrochloride mixed. PW2, Christopher Joseph Shekiondo prepared the respective report (exhibit P1). Insp. Marco Masunzu (PW8) recorded the cautioned statement of Pendo Cheusi while PF.10304 Insp. Lumala (PW9) recorded the cautioned statement of the 2nd appellant (exhibit P6).

The appellants and their fellow were defence witnesses by themselves. The 2nd appellant disowned the alleged confession by

retracting the cautioned statement. Since, he claimed to have been tortured so he signed it forcefully not knowing its contents.

As such, the appellants denied having had trafficked in drugs and or possessing them. They questioned the validity of the alleged discovery of the drugs at Pendo Cheusi's house, as they did not participate in the search. However, it was not disputed that the 2nd appellant is the son of the said Upendo Cheusi and that the 1st appellant is the former's nephew.

Upon full trial, the learned trial Judge was satisfied that the prosecution case was proved beyond reasonable doubt against the appellants. Since, he considered PW10 to be a witness of truth and his evidence was complimented by the 2nd appellant's cautioned statement (Exhibit P4). And that Upendo Cheusi stored the drugs under the direction of the appellants, as the latter had that knowledge. As such, the learned trial Judge invoked the doctrine of constructive possession.

Dissatisfied, the appellants have fronted a total of twenty-one points of grievance, ten points in the substantive and eleven points in the supplementary memoranda of appeal, respectively. Paraphrased, the grounds, in the substantive memorandum read:

1. *That, the prosecution case was not proved to the standard required.*
2. *That, with respect to evidence by PW4, PW7 and PW10 the doctrine of constructive possession of the drugs, exhibit P2 was improperly invoked.*
3. *That, the particulars of the offences did not disclose the offence charged since the evidence of PW4, PW7 and PW10 could not cure the defect.*
4. *That, the defect in the purported charge was fundamental going to the root of the matter.*
5. *That, the search, seizure, counting, and parking of the drugs improperly founded conviction for not involving the appellants in the four processes.*
6. *That, the search and seizure contravened the mandatory requirement of section 38 of the Criminal Procedure Act and Police General Order No. 262.*
7. *That, the chain of custody of exhibits was not observed.*
8. *That, PW4, PW6, PW7 and PW10 are police officers the evidence of whom, the prudence demanded corroboration which is lacking.*
9. *That, the trial judge improperly evaluated the evidence resulting into wrong conclusion.*
10. *That, the appellants' conviction is not supported by evidence on record.*

The Supplementary Memorandum of Appeal reads as follows:

1. *That, the appellants' conviction was wrongly founded on the doctrine of constructive possession of the drugs.*
2. *That, the chain of custody of exhibits was broken since the appellants were not present when the drugs were being packed and transported from Lindi Police Station to Dar es Salaam for examination.*
3. *That, the statement of Pendo Cheusi was wrongly admitted in evidence against the appellants since the maker was co- accused who died later and the case marked to have abated.*
4. *That, the 2nd appellant's cautioned statement was wrongly recorded and admitted contravening the provisions of sections 50 and 51 of the CPA and involuntarily.*
5. *That, the purported drugs were seized in an illegal search.*
6. *That, the prosecution evidence bore material contradictions going to the root of the matter.*
7. *That, the prosecution case was not proved beyond reasonable doubt.*
8. *That, the trial Judge erred both in law and fact for convicting the appellants relying on unsatisfactory evidence.*
9. *That, the search and seizure of the exhibit contravened section 38 of the CPA and Police General Order No. 226.*
10. *That the trial Judge erred in law and fact in not finding that, PW4, PW7 and PW10 were police officers with common intention whose evidence needed corroboration.*

11. That, the passing of the custodial sentence imposed on the appellants contravened section 172(2) (c) of the CPA for not deducting the period already spent by them post-conviction.

At the scheduled hearing of the appeal, the appellants had the services of Messrs. Majura Magafu and Hudson Ndusyepo learned counsel. Mr. Wilbroad Ndunguru learned Principal State Attorney joined forces with Mr. Credo Rugaju and Ms. Faraja George learned Senior State Attorneys to represent the respondent Republic.

From the very outset, Mr. Magafu dropped all the grounds in the supplementary memorandum of appeal, except the 4th ground. It reads: *That; the 2nd appellant's retracted cautioned statement was inadmissible in evidence for contravening sections 50 and 51 of the CPA.*

For the substantive memorandum of appeal, Mr. Magafu put the grounds in four clusters. He argued the 1st, 2nd, 9th and 10th grounds of appeal conjointly contending that, the trial Judge failed to evaluate the evidence of PW4, PW7 and PW8 in details hence contravening section 312 of the CPA. And that the said failure resulted to the wrong decision that the appellants owned the drugs (exhibit P2). He beseeched us to quash the impugned decision because of the problem singled out above. He relied on

the Court's decision in **Godfrey Richard v. R**, Criminal Appeal No. 365 of 2008 (unreported) to support his proposition. Further, he contended that, the alleged independent witness PW5 was improperly declared hostile. Since, the appellants were denied opportunity to cross examine her and therefore, the prosecution case lacked such corroborating evidence.

Moreover, Mr. Magafu contended that, the 1st appellant was not permitted to participate in the alleged search and seizure of the drugs at Mchinga II Lindi rural. Since, he was left at Lindi Central Police Station whereas the 2nd appellant was kept away in the car much as the respective certificate of seizure was not admitted for being unreliable documentary evidence. Mr. Magafu added that, the trial Judge wrongly admitted the statement of the deceased Pendo Cheusi for the prosecution. Since, she was a co-accused. And that the doctrine of constructive possession of the drugs was improperly invoked against the appellants in the circumstances. He referred to us the Court's decision in **Twalib Omary Juma @ Shida v. R,** Criminal Appeal No. 262 of 2014 (unreported) to support his contention. Since, the drugs were not recovered from the appellants' hands and a receipt issued. Mr. Magafu insisted that, none of the appellants led to the discovery of the drugs from the house of the said

Pendo Cheusi. In the circumstances, Mr. Magafu argued, the prosecution did not discharge its cardinal duty to prove the case to the hilt, as the Court proposed in **Mohamed Said Matula v. R** [1995] T.L.R. 3. It is more so, he added, the respective two certificates of valuation appearing at pages 523 and 553 of the record of appeal vary in terms of the weight and value of the said drugs.

We recall the 3rd and 4th grounds of appeal are about the alleged defects of the information. Arguing these grounds conjointly, Mr. Magafu contended that the defect is incurable as the particulars of the offence therein did not disclose the offence charged, and no amendment was made to cure it. Since, in terms of sections 102 and 103 of the Evidence Act Cap 6, the oral evidence could not fill in the gaps, the overriding objective principle apart.

Mr. Magafu, rightly did not expound on the 5th and 6th grounds of appeal rightly so, as they were canvassed in the submission on the immediate preceding grounds of appeal.

The 7th ground of appeal concerns the chain of custody of the drugs (exhibit P2) with respect to evidence adduced by PW7, PW4 and PW10. On this, Mr. Magafu contended that, the chain was not left intact to salvage

the case. Since, the alleged handing over of the drugs to PW3 was not witnessed by appellants nor was it documented to show its authenticity. The more so, Mr. Magafu argued, neither SSP Hokororo who is allegedly the investigations team leader appeared to testify nor was the respective exhibit register tendered in evidence as an exhibit. Let alone the non-appearance of one Zainabu Maulana who allegedly witnessed the packing of the drugs.

About the 6th ground of appeal, Mr. Ndusyepo attacked the police investigations officers for fumbling the respective search deliberately abrogating section 38 (1) (2) and (3) of the CPA and Police General Order number 226 (the PGO). Since, the officers had the clues beforehand. However, they searched without a requisite warrant, which was quite un-procedural. He relied on our previous decisions in **Director of Public Prosecutions v. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019 [2021] TZCA 482 (14 September, 2021; TanzLII) and **Shaban Said Kindamba v. R**, Criminal Appeal No. 390 of 2014 (unreported). Further, Mr. Ndusyepo asserted that, the exhibits are liable to be expunged from the record.

Lastly, it is on the sole ground, number four in the supplementary memorandum of appeal. It concerns the 2nd appellant's retracted cautioned statement but admitted as exhibit and its efficacy. Whereas, Mr. Magafu agreed with the legal principle that, the best witness is an accused who confesses his guilt, yet he queried the statement for it was belatedly recorded and the appellant tortured. Mr. Magafu, on that account beseeched us to expunge the cautioned statement from the record.

Replying, Mr. Ndunguru commenced his submission by resisting the appeal. He responded to the grounds of appeal in the sequence proposed and adopted by Mr. Magafu permitted by the Court. As regards the combined substantive 1st, 2nd, 9th and 10th grounds of appeal, that the learned trial Judge analyzed the evidence improperly reaching at the wrong decision, Mr. Ndunguru contended that, after it was vainly objected, the 2nd appellant's confession statement (exhibit P6) had established the following incriminating facts clearly: **One**, the appellants trafficked in narcotic drugs at the coast of Indian Ocean thus, constructively possessed them storing them in the house of Pendo Cheusi at Mchinga II. To establish this kind of possession against the appellants, Mr. Ndunguru cited the Court's decision in the case of **Moses Charles Deo v. R** [1987] T.L.R. 134. **Two**, the 1st

appellant had rented Room No. 104 at the hotel and the 2nd appellant led to his arrest. Three, the 2nd appellant led the policemen to the discovery of the drugs; **four**, the appellants are blood-tied and they conspired to the commission of the offence charged, and **five,** the 2nd appellant, in his cautioned statement admitted to have signed the certificate of seizure following the respective search at Mchinga II. Moreover, Mr. Ndunguru asserted, like the 1st appellant the 2nd appellant had always referred the substance as drugs. Further, he contended that indeed, PW5, the independent witness turned hostile and on that basis was discharged.

Regarding admissibility of the statement of the deceased Pendo Cheusi, under section 34B of the Evidence Act, Mr. Ndunguru contended that, it was properly admitted in evidence. Since, it showed that, the drugs belonged to the appellants and were retrieved from the house of the said late Pendo Cheusi, who could not be tried because she passed on before being committed for trial.

With respect to the substantive 3rd and 4th grounds of appeal, about the propriety or impropriety of the information preferred against the appellants, Mr. Ndunguru contended that, in fact the information was not defective. Since, he asserted, the appellants understood clearly the context

of trafficking in drugs and accordingly marshaled defence. Clarifying his point, Mr. Ndunguru referred us to section 2 of the Act which defines the word "trafficking" to include possession, storing, conveyance, transporting, importing, exporting etc. The 2nd appellant, in his cautioned statement acknowledged it well, let alone the said statement of Pendo Cheusi, the oral account of PW7 and others. The learned Principle State Attorney stressed that the defects of the information, if any, are curable as correctly found by the learned trial Judge.

On the 5th and 6th grounds of appeal, Mr. Ndunguru contended that, upon discovering of the drugs, the investigation was a bit complex and hectic in the circumstances, such that, a search warrant could not be procured without undue delay. That, the search was more or less emergence and so mounted. And that appearance of the said Hokororo, the local Regional Crimes Officer was insignificant, as rightly held by the trial Judge.

About the 7th ground of appeal which impeaches the chain of custody of the exhibit-drugs, Mr. Rugaju after he chipped in cited the current legal position that, at times a mere oral account in place of paper trails is sufficient to establish it and prove existence of a disputed fact in evidence.

Since, he added, the 2nd appellant had witnessed the search, the seizure and the counting of the packets of the drugs at Mchinga II. And later on, the 1st appellant witnessed the re-counting at Lindi Central Police Station. Again, Mr. Rugaju argued that during the trial, none of the appellants seriously challenged the genuineness of the drugs or the attached oral account given. Since, the drugs could not have changed hands quickly easily to be tempered with. To fortify his point, Mr. Rugaju cited our decision in **DPP v. Akida Abdallah Banda,** Criminal Appeal No. 32 of 2020 [2023] TZCA 209 (28 April 2023; TanzLII).

Regarding the sole 4th ground of appeal in the supplementary memorandum of appeal, on the admissibility or inadmissibility of the 2nd appellant's cautioned statement, Mr. Rugaju urged the Court not to fault the trial court for admitting it in evidence. He added that the alleged shortfalls be discounted, as did the learned trial Judge. Since, the delay, if any in the recording of the said statement was inevitable in the circumstances.

About the appellant's complaint on the report by the Government Chief Chemist, Mr. Rugaju quickly agreed with Mr. Magafu that, indeed the report was not read in court abrogating the law. On that basis he

beseeched us to expunge it from the record. However, he asserted that, the respective oral evidence would found the appellants' conviction. He cited the Court's decisions in **William Kasanga v. R**, Criminal Appeal No. 90 of 2017 [2020] TZCA 279 (28 May 2020; TanzLII) and **Saganda Saganda Kasanzu v. R,** Criminal Appeal No. 53 of 2019 [2020] TZCA 304 (18 June 2020; TanzLII).

Rejoining, Mr. Magafu reiterated his earlier submission. Regarding the said Government Chemist Report (exhibit P1) that, gone is the report, there is no evidence left to found a conviction.

As regards the alleged two conflicting certificates of valuation of the drugs, Mr. Magafu still faulted the learned trial Judge for not discounting them. He further contended that the cases cited by the learned attorneys for the respondent are distinguishable with the present case.

Having heard the learned counsel's submissions for and against the appeal and considered the record of appeal and the authorities cited, the central issue is whether the prosecution case was proved beyond reasonable doubt.

For ease and convenient determination of the appeal however, unlike the parties' learned counsel opted, we shall begin with the 3rd and 4th grounds of the substantive memorandum of appeal, on the propriety or impropriety of the founding charge. We had ample time to read it twice and thrice between the lines as appearing at pages 19 and 20 of the record of appeal. Its most relevant part is reproduced as under:

" 1ST COUNT
STATEMENT OF OFFENCE

TRAFFICKING IN NARCOTIC DRUGS, Contrary to Section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drug Act, [CAP.95 R.E. 2002].

PARTICULARS OF OFFENCE

ATHUMAN MOHAMED NYAMVI @ ISMAIL ADAMU, AHMAD SAID MOHAMED@HEMED SAID AND MAUREEN AMATUS JOACKIM LIYUMBA, on or about 12th day of January, 2012 at Mching II Village within Lindi District in Lindi Region, did traffic in Narcotic Drugs namely; Heroin Hydrochloride weighing 11,044.30 grams valued at Tanzania Shillings Four Hundred Ninety Six Million Nine Hundred Ninety Three thousand Five Hundred (Tshs.496,993,500/=) only.

2ND COUNT
STATEMENT OF OFFENCE

TRAFFICKING IN NARCOTIC DRUGS, Contrary to Section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drug Act, [CAP. 95 R.E. 2002].

PARTICULARS OFFENCE

ATHUMAN MOHAMED NYAMVI @ ISMAIL ADAMU, AHAMAD SAID MOHAMED@HEMED SAID AND MAUREEN AMATUS JOACKIM LIYUMBA, on or about 12th day of January, 2012 at Mchinga II Village within Lindi District in Lindi Region, did traffic in Narcotic Drugs namely; Heroin Hydrochloride and Cocaine Hydrochloride Mixture weighing 200,531.40 grams valued at Tshs. Nine Billion Twenty-Three Million Nine Hundred Thirteen Thousand Only (Tshs.9,023,913,000/=) only".

From the look of the excerpt above, we note that the wording of the charge is free of any material ambiguities. It aligned with the requirement of sections 2 and 15(2) of the Act which set forth instances under which, as is the case before us, the offence of trafficking is said to have been committed. The relevant part of it reads:

> *..." **trafficking" means** the importation, exportation, buying, sale , giving, supplying, **storing, possession,** production, manufacturing, conveyance, delivery or distribution by any person of narcotic drug...".* (Emphasis added)

The Court tested the section 2 above in **Livinus Uzo Chime Ajana v. R,** Criminal Appeal No. 13 of 2018 [2020] TZCA 383 (7 August, 2020; TanzLII)**.** However, we note that, even if, it is assumed that the charge was defective as alleged, which is not the case, the bottom line would be whether the appellants were prejudiced and if the answer is yes, to what extent. We note the appellants' defence evidence at pages 414-432 and 435-452 of the record of appeal do not suggest that the information laid at their doors was too vague for the appellants to appreciate the nature and gravity of the offence charged. Since, they marshaled their defence without difficulties. See- our decisions in **Mussa Mwaikunda v. R** [2006] T.L.R.

387 and **Remina Omari Abdu v. R**, Criminal Appeal No. 189 of 2020 [2020] TZCA 118 (15 March, 2022; TanzLII), from a plethora of authorities. Therefore, we agree with Mr. Rugaju's contention and dismiss the 3rd and 4th grounds of appeal for being unmerited.

We recall that the 5th and 6th grounds of appeal impeach the search and the resultant seizure of the drugs (exhibit P2) with respect to the 1st appellant. These grounds need not detain us. It is so because, it is not disputed that upon being arrested at the hotel in Room No.104, the 1st appellant was not transported to Mchinga II where the drugs were retrieved, from the house of Pendo Cheusi. As such, he was convicted based on the doctrine of constructive possession of the drugs. This is gleaned from the learned trial court's finding at page 667 of the record of appeal, in the judgment. The 2nd appellant's conviction was founded based on two main facts and evidence: **One,** he is the one who led the police officers to the discovery of the drugs from the house of Pendo Cheusi who is the 2nd appellant's mother and, undisputedly, the 1st appellant's grandmother and **two,** his confessional statement (Exhibit P6) showing that, he and the 1st appellant had the knowledge that the drugs are stored there. The totality of the two facts therefore, will show that the appellants

had the control and interest in the drugs. They cannot run away from it. See- our decisions in **Moses Charles Deo v. R** [1987] T.L.R. 134 and **Nurdin Akasha v. R**, Criminal Appeal No. 190 of 1994 [1995] TZCA 46 (23 October 1995; TanzLII).

On the foregoing aspect of evidence, we recall that the 2nd appellant had retracted his cautioned statement. Just as we are mindful of the long well established and accepted legal principal that was stated by the Defunct Court of Appeal for East Africa in **Tuwamoi v. Uganda** (1967) EA 84, that, not only an accused's retracted cautioned statement is incapable to corroborate, but also, very seldom than not shall it found conviction of co-accused. Nonetheless, in the circumstances of the case before us, the 2nd appellant's retracted cautioned statement had enough strength to found a conviction. The reason is that, the evidence of 1st appellant's oral account significantly corresponded with the evidence of the 2nd appellant, on how the 1st appellant got his way from Dar es Salaam to Lindi, in the hotel where both were arrested, charged and later arraigned in court. Considering the 2nd appellant's cautioned statement, we wish to restate the legal principle that, generally the best witness is an accused who confesses his guilt. See- the Court's decision in **Bahati Makeja v. R**, Criminal Appeal

No. 118 of 2006 [2011] TZCA 31 (28 February 2011; TanzLII). As such, by his confession, the 2nd appellant cut the long story short that, he and the 1st appellant are the perpetrators of the offence charged and is ready for the consequences. On that note, the 5th and 6th grounds in the substantive and the 4th ground in the substantive memoranda of appeal lack merits and are dismissed.

With regard to the 7th ground of appeal, about the chain of custody, with profound respect, it will not take us long to resolve it. We are unable to agree with Mr. Magafu that, none-appearances of the local Regional Crimes Officer and Zainabu Maulana in court to testify about the seizure and handing over of the drugs rendered the prosecution case sterile in the circumstances. So it is about the failure of the respective investigations officers to cause the 1st appellant to participate in the parking of the drugs for examination in Dar es Salaam. Equally, it did not impact on the chain of custody of the exhibit for lack of documentation. Moreover, we shall agree with Mr. Rugaju's contention that gone are the days where paper trails was a necessary requirement to establish an intact chain of custody of exhibits. Since, only oral account is enough. It all depends on the circumstances of each individual case. It is so because, in this appeal the possibilities of the

drugs to be tempered with along its way to the trial court is ruled out. See- the Court's decision in **Joseph Leonard Manyota v. R,** Criminal Appeal No. 485 of 2015) [2017] TZCA 260 (11 August 2017; TanzLII). We took the same stance in **Kadiria Said Kimaro v. R**, Criminal Appeal No. 301 of 2021 (unreported). Therefore, the 7th ground of appeal also crumbles.

Finally, is about the supplementary 4th ground of appeal, on the 2nd appellant's retracted cautioned statement (Exhibit P6) and the evidential value attached to it. We commend the learned trial Judge's finding on it. The 2nd appellant may have made the statement not freely but voluntarily in the circumstances. The reason he made the statement before the police officer is obvious. Since, it is the accused's voluntariness that counts most. Regarding the timing for its recording, we note that, the period allocated can never be open ended. However, we are satisfied that, the length of time taken by the investigators from the hotel to Mchinga II, to mount a search there, to park the drugs and then come back to Lindi Police Station is justifiable in the circumstances of the case. The more so, is where, as is in this case and contended by Mr. Rugaju, the first appellant did not show how he was prejudiced by the cautioned statement being belatedly recorded. Confronted with a similar problem, in **Chacha Jeremiah**

Murimi and Three Others v. R, Criminal Appeal No. 551 of 2015 (unreported), we followed **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported) holding that, if the combination of public interest and the rights and freedom of the accused can bring the same results so much the better. In other words, 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."*

As such the 2nd appellant's objection to the admissibility of the statement was correctly overruled.

Before we embark on the substance and evidential value of the 2nd appellant's cautioned statement (exhibit P6), we deem it useful to sum up the most operative part of it which appears at pages 560-567 of the record of appeal. That upon being requested by the 1st appellant from Mtwara Airport, he picked the latter and girlfriend to Lindi where the couple rented Room No.104. Thereafter, the appellants drove to the beach of Mchinga II and picked the drugs. That, they stored the drugs at Pendo Cheusi and then drove back to the hotel in town where they were arrested by police immediately on arrival and charged as such.

Also summed up, the relevant part of the statement of Pendo Cheusi (exhibit P5) at pages 554-559 of the record of appeal has it that, as she was in bed on 11/01/2012 at about 23:00 hours, the appellants who are her grandson and son respectively, had brought and stored some plastic containers there. That she vainly needed to know what was in the containers, which turned out to be the drugs, after the police men arrived later with the 2nd appellant under arrest.

By coincidence, the statement of Pendo referred above diametrically corresponds with what appears at pages 414 – 415 of the record of appeal. The 1st appellant averred that, he arrived in Dar es Salaam from South Africa on 10/01/2012 by Kenya Airways (KQ). Then, he flied to Mtwara and drove to Lindi Oceanic Hotel in Lindi same day together with his girlfriend, the 3rd accused then. Meaning that, the appellants' statements would not have that materially tallied had the appellants not communicated before agreeing to meet at the hotel. The agreed time could be in the very material evening or immediately before aiming to accomplish the plot. We are increasingly of the view that the appellants meeting in the material evening at the hotel was by design.

We wish, at this juncture to point out that, the effect of a self-incriminating statement cannot be over emphasized better than the Court did in **Paulo Maduka and Four Others**, Criminal Appeal No. 110 of 2007 See also- **Bahati Mateja v. R**, Criminal Appeal No. 118 of 2006 (both unreported). It is built on the logic and wisdom that, in any criminal case the best witness is an accused who confesses his guilt. By necessary implication therefore, the 2nd appellant's cautioned statement cut the long story short. In other words, the issues of defective charge, improper or illegal search and seizure of the drugs, failure of the alleged material witnesses including the said SSP Hokororo to appear at the trial and the like, should have not been raised in the first place. So is non-production of the handing over report on the drugs, also absence of the corresponding search warrant.

Before we wind up, we are satisfied therefore, that, the appellants had constructively possessed the drugs. We agree with Mr. Ndunguru's analysis and proposition that the case against appellants was proved to the hilt. To recap: **One**, the 1st appellant admitted that he was arrested and charged in Lindi town at Oceanic Hotel Room No. 104 immediately on his arrival from South Africa via Mwalimu JKN International Air Port Dar es

Salaam and Mtwara Air Port on 10/01/2012, **two**, the 2nd appellant who drove the car (exhibit P7) is the 1st appellant's nephew and that the two were arrested immediately after they arrived at the hotel, **three**, the 2nd appellant's cautioned statement has it that the two were accomplices in the offence charged, **four**, the 2nd appellant was arrested just before he embarked from the car and its engine got to its complete stop. This proposes there being two possibilities: (i) that the appellants had just arrived at the hotel together or they were just about to leave the hotel accomplishing the mission (ii) being so associated in the crime, it did not bother the 1st appellant to provide details of the motor vehicle, if any, which allegedly ferried him from Mtwara Air Port to the hotel. We entertain no doubts therefore, that the appellants had such a common intention as charged. We note that, the finding above shall not be mistaken for shifting the burden of proof to the 1st appellant, which ordinarily lies on the prosecution (iii) the 1st appellant did not sufficiently dispute the discovery of the drugs at the house of Pendo Cheusi at Mchinga II on 11/01/2012. The 2nd appellant agreed with this fact as it appears at page 440 of the record of appeal, that he led the policemen to that house where the drugs were retrieved. He thus, implicated the 1st appellant and (iv), from the outset of the charge, the appellants referred the substance as drugs.

Therefore, to call it otherwise at this stage is an afterthought. In the circumstances above therefore, the issues of non-participation of the 1st appellant in the respective search and seizure of the drugs, or rather illegal search and that one on the alleged two conflicting certificates of valuation of the drugs are immaterial. Since, the appellants had constructively possessed the drugs.

The more so, is the statement made by Pendo Cheusi (Exhibit P5) which added value to the prosecution case. Since, her statement implicated the appellants that the latters' drugs had been stored and now retrieved from there. Also noted is that, in such complex criminal rackets, the threshold for establishing constructive possession was sufficiently met. That the accused now appellants had the knowledge, control and interest in the drugs which is subject matter of the charge. We remark that, unlike in arithmetic progression calculations where mathematicians can state beforehand what would be the next number in the sequence, in criminal law and procedure where the doctrine of constructive possession is under scrutiny, the courts are obliged to see the unseen by connecting the complex dots. We are satisfied that the trial court properly invoked the doctrine as demonstrated above. We decline to fault the learned trial

Judge. The 4th ground of appeal in the supplementary memorandum of appeal is bound to fail and we dismiss it.

In the end, we find the appeal unmerited and dismiss it entirely.

Order accordingly.

DATED at **MTWARA** this 10th day of June, 2024.

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of June, 2024 in presence of the Mr. Majura Magafu and Mr. Hudson Ndusyepo, learned counsel for the Appellants and Mr. Justus Revocatus Zegge, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL