IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPLICATION NO. 112 OF 2017

(Originating from the District Court of Kiteto Cr. Case No. 124/2016)

PRICILA FRANCIS.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

DR.OPIYO, J.

The appellant PRISCILA FRANCIS was charged in the District Court of Kiteto at Kibaya with the offence of unlawfully possession of prohibited plants contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act No 5/2015. She was found guilty, convicted and sentenced to thirty five (35) years imprisonment.

The brief facts of the case was that, On 26th September, 2016 the appellant was among the passengers traveling from Arusha to Engusero by bus, upon reaching Lailelo bus stop the appellant requested the conductor to drop her off, the conductor smelled Mirungi on the appellant's bag, refused to hand the same to her and returned it to the boot of the bus, and narrated the story to PW2 WP Asha who was among the passengers in

the said bus. After reaching Kiteto bus stop the appellant who followed the bus by motorcycle took her bag in the boot in presence of PW2 and when she opened it had "mirungi" inside it. PW2 arrested her and took her to Police Station with her bag. She was interrogated and arraigned before the court of law to answer the charge.

The appellant was aggrieved with the decision of the trial magistrate and appealed to this honourable court advancing seven (7) grounds as hereunder reproduced:-

1. That, the trial court erred in law and in fact in convicting the appellant without proof of the offence against her beyond all reasonable doubts as required by the law.

2. That, the trial court erred in law and in fact for failure to scrutinize the evidence tendered before him consequently holding the appellant herein criminally liable.

3. That, the trial court erred in law and fact by not finding that the purported cautioned statement was recorded outside the period stipulated under section 50 (1) (a) and 51(1) (a) and (b) of Cap 20 R.E 2002.

4. That the purported cautioned Statement was tendered and admitted in evidence contrary to the prescribed procedure.

5. That, the trial court erred in failing to comply with the provision of section 234 (2) (b) of the CPA Cap 20 R.E 2002

6. That, the failure by the prosecution side to summon the primary court magistrate as a witness, the trial court ought to have drawn an adverse inference against the prosecution.

7. That, the trial court erred in law and in fact by admitting exhibit P2 which was tendered by PW3.

Hearing of this appeal proceeded orally where the appellant appeared in person and the Republic was represented by Ms. Foka learned State Attorney. Arguing the appeal the appellant opted to start with the seventh ground that the court failed to follow the law by admitting exhibit No.2 tendered by PW3. She argued that, PW3 was not a competent person to tender the exhibit as he was not the one who prepared it. She said, the one who would have tendered the document is the Primary Court Magistrate who ordered destruction of those Narcotic drugs, if any. She was of the view that, failure to call the Magistrate as a key witness caused the court to reach unfair decision.

Arguing of the third ground, she said the court erred in law by failing to note that cautioned statement were recorded contrary to law because, the court records do not shows that the 3rd prosecution witness prayed to tender them as exhibit. Also they were read before they were admitted as

exhibit. At page 11 of the proceedings 19th line from above she did pray the same to be refused admission but the court failed to direct her on her basic rights if she was ready for witnesses to be re-called and the case to start afresh, especially after prosecution prayed to substitute charge. At pg 13 of the proceedings line 8 and 9,10,12,13 & 14 one will note that she was not properly informed of her basic right under the circumstances.

It was her argument that, looking at page 5 of the proceedings, line 23 from above it is shown that that she was apprehended on 26/9/2016 as per PW3 testimony, but cautioned statement was recorded on 30/9/2016, that was after more than 90 hours, she contended that there was no any reasonable reasons adduced by PW3 why the statement was recorded beyond the prescribed time, she prayed that this court expunge the caution statement as unreliable exhibit in this case.

On the ground that, the court failed to examine and evaluate prosecution evidence against her it was her argument that, in his testimony PW1 said he was not remembering the date of the incidence, but only said it was September. This was not corroborated by evidence of PW2. PW2 on his side said they apprehended her with the said Narcotic drugs at the bus on 26/9/2016 such contradiction is a proof that their testimony was not credible. There is a hidden agenda in this case. They heard conductor testifying that she was the one who gave him the bag alleged to contain Mirungi. She argued that it is not conceivable how she gave the conductor her luggage as she had dropped instead of him giving her the luggage. As

passengers in the bus one hands the luggage to conductor and upon disembarking, it is the conductor who hands over the luggage to the passenger. It was not easy for her to have given the luggage with drugs to someone else as doing so possed a danger to her.

She concluded that, in all, prosecution failed to prove their case against her beyond reasonable doubt as required by the law in the circumstances she pray for the court to allow appeal and order her release based on the above submission in support of her seven grounds of appeal.

In reply thereto Ms. Foka, Learned state Attorney in response to ground No. 7 she said, as per pg 11 it is the investigator who tendered inventory as exhibit P2, that was right as pg 10 shows that it is PW3 who prepared inventory in question as it is normally the procedure for destruction of perishable exhibits. Magistrate is only certifying her consent for the destruction of the same. So, the one who filled it up is the one who tendered the same, that is PW3. Thus, it could not be proper for magistrate who certified to tender the document authored by the police officer.

On second ground, regarding cautioned statement being filled out of prescribed time. The learned State Attorney argued that, it is true she was apprehended on 26/9/2016 and taken to court on that date, but she requested her statement not to be taken on that day awaiting her sister. That is what happened and when preliminary hearing was conducted that

was made clear and at pg 6 line 8 from above she agreed that she is the one who refused interrogation in the absence of her sister. So the delay was due to her request to wait for her sister. This procedure is blessed under S.50 (2) (b) (iii) of the Criminal Procedure Act. That, time from when the accused is taken to custody and that accused requests to await for his advocate or relative is excluded, so, it was recorded without violating any provision of the law.

On 5th ground on substituted charge, Ms. Foka submitted that, it is true charge was substituted as per pg 13 of the proceedings. The court granted prayer for substitution and it was put clear that they did not intend to call witnesses afresh as the substitution did not affect their evidence. Appellant did not object that. It is trues ection 234 (2) (b) of the CPA gives mandate to the accused to demand recall of the witness, but when Magistrate asked the appellant if she had any objection she replied not having any. That, substituted charge was read and explained to her and she did enter her plea as procedurally required under the law. So, no law was violated.

On proof of prosecution case, the learned State Attorney argued that, PW1 said, it was September without specifying date but PW6 said with certainty it was on 26/9/2016, the date not disputed by the appellant. PW7 said he was given file on 27/6/2016. To her, this does not show any contradiction that she was apprehended on 26/9/2016. However in her cautioned statement tendered as exhibit, she admitted being found in possession of

those Narcotic drugs. Thus, the case on prosecution's side was proved beyond reasonable doubt. It was her prayer that conviction and sentence be up held.

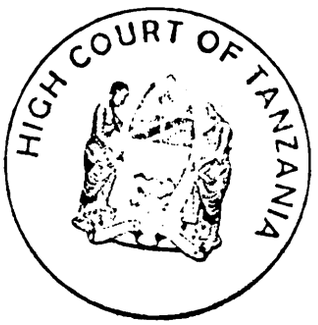
The crucial issue in this appeal is whether the charge was proved to the required standard of proof. I will start with the chain of custody, I have gone through the prosecution evidence they never established the chain of custody. it was the testimony of the PW1, and PW2 that, they did find the appellant bag containing MIRUNGI when she was disembarking from the bus at Lailelo Bus stop. PW2 took the appellant and her bag to Kibaya Police Station and handed the appellant with her luggage to Inspector Mbaruku. From the testimony Of PW3 he was the one who took the sample of the alleged Mirungi to the Government Chemistry before they destroy the same. From the evidence of PW2 and PW3 the prosecution failed to establish the chain of custody from when the bag was seized from the appellant, its storage and handing over of the sample from the bag to the person who sent it to the Government Chemists. The idea behind record the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime. See the case of (**PAULO MADUKA V R** Criminal Appeal NO 110 OF 2007 CAT (Unreported)). The chain of custody requires from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.

In the case at hand unfortunately, this valuable guiding principle in criminal investigations, was not observed at all and enforced. As a result there was no linkage between the bag seized from the appellant at the bus stop and the content of the sample that was analyzed by the government chemistry, without this linkage, the chances for the success of the prosecution case becomes very slim in such cases. The prosecution neither summoned the exhibit keeper as a witness nor tendered the exhibit register as exhibit in court, under those circumstances the chain of custody broke. From the prosecution evidence there is no cogent evidence to connect the appellant with the offence she was charged with.

For the above reasons, I hold that this appeal has substance, I accordingly allow it. I quash the conviction of the appellant and set aside the sentence. I order her immediate release from custody unless she is held there for some other lawfully cause.

(SGD) DR. M. OPIYO,
JUDGE
10/04/2018

I hereby certify this to be a true copy of the original



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D.J. MSOFFE
AG. DEPUTY REGISTRAR
ARUSHA.