

IN THE HIGH COURT OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

DC CRIMINAL APPEAL NO. 21 OF 2020

(Originating from Criminal Case No. 96 of 2019

of Korogwe District Court)

PAULINA D/O EMMANUELAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MKASIMONGWA, J.

The Appellant one **Paulina Emmanuel** and **Ibrahim S/O Salimu** stood before the District Court of Korogwe District jointly and together charged with Transporting Narcotic Drugs Contrary to Section 11 (1) (d) of the Drugs Control and Enforcement Act No. 5 of 2015. It was alleged by the Prosecution that:

"Paulina D/O Emmanuel and Ibrahim Salim are jointly and together charged on the 04th March, 2017 at along Mazinde – Korgwe Road – Mkumbara Village within Korogwe District in Tanga Region were found transporting Narcotic Drugs to wit

6.22 Kilograms of Catha Edulis Leaves commonly known as Mirungi”.

The two pleaded not guilty to the charges and after a full trial, the court found the Appellant guilty of the offence and was accordingly convicted as charged whereas the charge leveled against Ibrahim Salim was dismissed and the later was acquitted. The Appellant was consequently sentenced to thirty (30) years imprisonment. Through the legal services of Mr. Mathias Nkingwa (Advocate), the Appellant has lodged this appeal challenging both the conviction and sentence imposed on her. In the Petition of Appeal filed, Mr. Nkigwa listed four grounds as follows;

1. That the trial court erred in law and in fact when it convicted and sentenced the Appellant though the prosecution had failed to abide to the rules governing the chain of custody and preservation of Exhibit.
2. That the trial court erred in law and facts by finding the Appellant guilty of the offence charged on inconsistent and contradictory statements of the prosecution witnesses.

3. That the trial court erred in law and facts by convicting and sentencing the Appellant without considering the failure by the prosecution to abide with the principles of seizure.
4. That the trial court erred in law and fact when it convicted and sentenced the Appellant while the prosecution failed to prove the case to the required standard of proof.

The Appeal is contested by the Respondent. On the date the Appeal came for hearing before me, Mr. Mathias Nkingwa and Ms. Kayuni, the learned Advocate and State Attorney, respectively, appeared on behalf of the Appellant and Respondent.

When he was invited to present his case, Mr. Nkingwa argued all grounds of Appeal. In respect of the first ground, the learned advocate contended that the trial court erred when it convicted the Appellant on the evidence which faulted the principles governing chain of custody of exhibits. He said that, going by the evidence the Appellant was arrested by Cpl. Mwantumu suspected of being in an unlawful possession of "Mirungi". Cpl. Mwantumu simply told the court in evidence that she took the suspected Mirungi to the Police Station and she is silent as to under whose custody the drugs were there at the Police station. Mr. Nkingwa added that

PW3, a police officer at Korogwe Police Station, admitted that later at 6:00am on the material day he received Mirungi from Mombo Police Station. PW3, a Police Officer at Mombo Station who worked as a store keeper, did not offer any clear explanation as to how the drugs were kept as from 04/03/2017 to 13/03/2017 when were taken to the Government Chemist for a laboratory test. In the Government Chemist's office at Tanga, PW5 (Chemist) received the alleged drugs from PW4. The drugs were so received with no any document which provided for details as Section 16 (1) of the Government Laboratory Authority Act. No. 8 of 2016 provides. This was a case again when the alleged drugs passed from the hands of Cpl. Mwantumu, PW3 and PW4. The learned advocate added that the prosecution did not exhibit if there was a report prepared in terms of Section 41 of the Drugs Control and Enforcement Act No. 5 of 2015. As there was no documentation on the movement of the alleged drugs from one person to another, the provisions of the Police General Order (PGO) 229 Order 15 were faulted. Mr. Nkingwa referred the court to the decision in the case of **Zainabu Nassoro @ Zena v. R**: Criminal Appeal Number 348 of 2015 which stresses on a chronological documentation or paper trail

showing seizure custody, control, transfer, analysis and disposition of evidence.

On the contradiction in the statements of the prosecution witnesses which constitutes the second ground of appeal, Mr. Nkingwa said; whereas Cpl. Mwantumu (PW1) told the court that the Appellant was arrested at Mazinde, PW2 one Cpl. Mjuni stated in evidence that the Appellant was arrested at Mombo. Similarly in evidence, Cpl. Haji (PW4) stated that he submitted dried Mirungi to the Chemist whereas PW5, the Chemist, admits receiving fresh Mirungi. Mr. Nkingwa submitted that the contradictions are material and that they raised a reasonable doubt which doubt should have been determined in favour of the Appellant.

As to the Certificate of Seizure tendered to the court and admitted as Exhibit and marked **Exhibit P1**, the same forms the basis of the third ground of appeal. In respect of the ground, Mr. Nkingwa submitted that, although there was a possibility of having an independent witness to witness the incidence, no one witnessed it. **Exhibit P1** clearly shows that only the Police Officers signed it. As there was no independent witness who witnessed seizure of the alleged Mirungi, **Exhibit P1** becomes devoid of

merit as it was held in its case of **David Athanas @ Makasi and Another v. R**: Criminal Appeal No. 168 of 2017.

Mr. Nkigwa last submitted that failure to abide to the principles governing the chain of custody of exhibits and the contradiction in the statements of the prosecution witnesses and that **Exhibit P1** was devoid of merit the prosecution's case stood not proved beyond reasonable doubt as it is alleged under the fourth ground of appeal. The learned advocate prayed the court therefore that it quashes the conviction and set aside the sentence imposed by the trial court and the Appellant should be released from jail.

On the other hand Ms. Kayuni (SA) as said earlier resisted to the Appeal. She stated that the evidence on record clearly shows how the Exhibit (Mirungi) moved from one hand to another without any kind of breakage. It all started with Cpl. Mwantumu who seized and kept the drugs and that on the same day she handed it over to Cpl. Salumu (RW3). PW3 confirmed this in his testimony to the court and he added that he kept it in the Exhibit room there at the police station before he handed over it to Cpl. Haji (PW4) who took it to the Chemist for analysis. It is again PW4 who took the exhibit from the Chemist on the same date and brought it back to

the Police Station where he handed it over to Cpl. Salumu (PW3) for safe custody. Later on 16/03/2017 PW3 handed over the exhibit to PR4 for destruction. It is clear from the evidence that the exhibits were handled by the witnesses in which case documentation was not necessary. The learned State Attorney referred the court to the decision in the case of **Goodluck Kyando v. R** (2006) TLR 363 which is to the effect that witnesses must be believed. Herein the case at hand Ms. Kayuni (SA) stated further that Cpl. Haji stated in evidence that he handed over the drugs to the Chemist along with a necessary Form which evidence was confirmed by PW5 who told that court that he received the Exhibit together with a Form issued by the Police.

As to the contradictions in the statements of the witnesses, Ms. Kayuni submitted that there was none and if any they did not go to the roots of justice. The learned State Attorney referred the court to the decision in the case of **Mohamed Said Matula v. R** (1995) TLR 3, to cement her argument. She narrated that, in evidence PW1 and PW2 talked of the same scene of crime as being at Mazinde area. As to the nature of the exhibit tendered to the Chemist for analysis Ms. Kayuni stated that,

there is nowhere in the record showing contradiction of the witnesses statements regarding the status of the exhibits.

In respect of the third ground of appeal, Ms. Kayuni submitted that the law is silent as to the necessity of procuring an independent witness when effecting seizure. Section 48(1) and (2) (vii) and (viii) of the Drugs Control and Enforcement Act, provides for procedures and powers of the officers that have to be exercise where it is practicable. The law does not provide to the effect that the case shall automatically collapse where an independent witness is not involved when a property is seized. Based on the submission, Ms. Kayuni prayed the court that it dismisses the Appeal in its entirety.

In a short rejoinder submission Mr. Nkingwa reiterated that in the case there was no documentation to prove the chain of custody of the exhibit. He also reiterated that, at the place the appellant was arrested that is Mazinde it was possible to procure an independent witness and that there was contradiction in the statements of the witnesses. As such the case was not proved beyond reasonable doubt. He prayed for the appeal to be allowed.

I have considered the submissions above as well as the evidence on record. The prosecution's case was briefly, to the effect that WP 3255 Cpl. Mwantumu (PW1) and F. 5662 Cpl. Mjuni (PW2) are the Police Officers stationed at Mombo Police Station. On 04/03/2017 during right the two were at Goha along Arusha – Dar es Salaam high way together with the other fellow police officers, namely, PC. Magnus, PC. William Ngindo and Cpl. Yohana, where they saw a motor cycle with three persons on it. When stopped by the Police officers the driver did not stop. The Police Officers. However, successfully chased for it and stopped at Mazinde where one of the passengers did successfully escape. There, there remained the driver and a woman passenger who had a black bag. When searched in the bag, the Police Officers found 65 bundles of Mirungi. The place was within a Sisal Estate and it was not practicable to procure an independent witness. Following the discovery of the narcotic drugs a Certificate of Seizure was prepared and signed by the suspects as well as the Police Officers. Both the seized drugs and the suspects were taken to Mombo Police Station. At the Police Station PW1 handed over the drugs to D/937 Sgt. Salumu (PW3), the Exhibit Keeper, and F. 4207 D/Cpl. Hassan (PW6) interrogated the Appellant. The later confessed to the offence and she led police officers

to Tai – Makanya so that she shows to the police where she got the drugs. In the process, the Appellant escaped from the lawful custody of WP. Happy before she was later in September, 2017 rearrested by PW6, at Kiloza Rock Hill Hotel.

The evidence is also to the effect that upon receiving the drugs from PW1, PW5 (Sgt. Salumu) kept them in a strong room until 13/03/2017 when he handed them over to Cpl. Haji (PW4). The later took the exhibit to the chemist one Saile Maregesi (PW5). The later confirmed receiving the drugs from PW4 and after weighing and taking samples from them, he properly sealed and handed them over to PW4 who, on the same day, took the exhibit back to PW3. PW3 confirmed that story evidence of PW4. On 16/03/2017 PW3 again gave the exhibit to PW4 for destruction purposes and the exhibit was accordingly destructed.

Coming back to the grounds of Appeal as well as the submissions; as to the chain of custody, now and again our superior court that is the Court of Appeal of Tanzania has stated the importance of the integrity of the chain of custody to eliminate the possibility of the exhibit being tempered with. In the case of **Paulo Maduka and Others v. R**: Criminal Appeal No.

110 of 2007 the court observed about what a chain of custody is. There the court stated that:

"... The chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it".

Under our laws failure to observe the chain of custody in handling the exhibit creates a real doubt if the prosecution proved its case against the accused. This was well stated in the case of **Moses Muhagama Lawrence v. the Government of Zanzibar**: Criminal Appeal No. 17 of 2002 CAT – (Unreported) where it was held that:

"There is a need to follow carefully the handling of what was seized from the Appellant up to the time of analysis by the Government Chemist of what was believed to have been found on the Appellant. We think the vital missing link in the handling of the samples from the time they were taken to the Police

Station to the time of Chemical analysis has created a real doubt if the prosecution proved its case against the Appellants to the required standard"

In the case at hand, indeed there was no documentary exhibit tendered to the court to prove the chain of custody of the exhibit. One may however look in the scenario that the drugs were seized by PW1. The later took it to PW3 for safe custody. PW3 gave it to PW4 for the later to take to PW5, Laboratory technologist, for laboratory test. After the test PW5 handed over back the drugs to PW4 who again took to PW3 for safe custody. Lastly PW3 handed the drugs to PW4 for destruction. Although the seizure, custody, control, transfer, analysis and disposition of the evidence was not documented, the fact that all the people's hands of whose the exhibit passed on were made witnesses before the court and that they testified and cross examined by the defence from which examination nothing suggested that they were not telling the truth, I find there was no vital missing of link in the handling of the samples from the time they were seized to their destruction. As such the chain custody cannot be doubted in this matter.

As to the contradiction in evidence, it is my considered view that there was ample evidence that the Appellant was arrested and interrogated in respect of the offence from which she was arrested. In the interrogation she confessed and volunteered to lead the police officers to the sources of the drugs. She however escaped from the lawful custody of the police when she was on the way to the sources before she was re-arrested. I have considered the questions put by the Appellant's counsel in cross examination and find there is nothing that suggests that piece of evidence to be untrue. The Appellant was arrested along Arusha – Dar es Salaam High way where both Mazinde and Bombo areas are located. The discrepancy as to the place of arrest between Mombo and Mazinde in my view does not go to the roots of justice. So it is immaterial.

Lastly, the Appellant had confessed to have committed of the offence. In court she did neither retract nor repudiate the statement. It remains therefore that she made the statement and that she made it voluntarily. In the circumstances she cannot be heard challenging the conviction on ground that the procedure and principles of seizure were not adhered only because, there was no independent witness procured to witness the seizure. Secondly, it is in evidence that the alleged offence was

committed during right time along the High way which fact attracts for a presumption that it was not practicable to procure an independent witness to witness the seizure.

From what I have endeavored to discuss above, I find, the case against the Appellant was proved beyond reasonable doubt. I find therefore that this appeal is devoid of merits and it is hereby dismissed in its entirety.

Dated at Tanga this 20th of October, 2020.



A handwritten signature in blue ink, appearing to read "E. J. Mkasimongwa".

E. J. Mkasimongwa

JUDGE

20/10/2020

Date: 20/10/2020

Coram: F. J. Kabwe, DR

Applicant: Present in Video Conference.

Respondent: Ms. Mkumba S/A for

C/C: Alex

Court: Judgment delivered in the presence of the Appellant and Ms.
Mkumba - S/A for the Respondent.

Right of Appeal is explained.

F. J. Kabwe

DEPUTY REGISTRAR

20/10/2020