IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 106 OF 2020

RASHID OMARI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Mkasimongwa, J.)

dated the 17th day of January, 2020
in
Criminal Sessions Case No. 10 of 2015

.....

JUDGMENT OF THE COURT

25th May, & 7th June, 2021

KOROSSO, J.A.:

Rashid Omari the appellant, together with Salimu Mohamed and Hussein Bakari Samsimbazi @ Samsimba were arraigned before the High Court for the offence of Trafficking in Narcotic Drugs contrary to section 16 (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E. 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2012. Suffice to note that Salimu Mohamed (the 2nd accused at the trial) was acquitted by the trial court and the case against Hussein Bakari Samsimbazi @ Samsimba which abated

before the end of the trial upon his death are not subject of the instant appeal.

It was alleged that, on the 12th September, 2013 at Misajini area in Mombo Town within Korogwe District, Tanga Region, the appellant and his two colleagues mentioned above jointly and together did traffic in narcotic drugs to wit, 313500 grams of Cannabis Sativa (also known as bhang) valued at Tshs. 31,350,000/- in a motor vehicle with Registration No. T788 CKC, Model Isuzu Forward. The appellant was the driver and Salimu Mohamed was the turn boy. The appellant and his colleagues denied the charges.

In the trial that followed, the prosecution fronted twelve (12) witnesses and ten (10) exhibits in pursuit to prove the charges facing the appellant. The factual setting of the case is expounded by prosecution witnesses as follows: According to WP 2157 Sgt Shamim (PW1), on the 12th September, 2013 at 5.00 hrs, while at Liverpool, Misajini Mombo Police check point as the shift incharge, together with her colleagues, inspecting vehicles driving through there, stopped one vehicle with Registration No. T788 CKC, Model Isuzu Forward coming from Moshi. After the vehicle stopped and parked, she asked from the

driver (the appellant) for his driving licence and the vehicle registration card. In the vehicle, apart from the driver there was also a turnboy. She also inquired on what he carried in the vehicle to which he responded that the vehicle carried empty plastic bottles. PW1 asked him so that they can inspect the vehicle and she then called other officers G 4430 Magnus Haule (PW5) and another officer named Hussein (who did not testify in the trial) to inspect the vehicle. Items that were found in the vehicle included empty plastic bottles, cattle horns inside sulphate bags, a bed, gas cooker and batteries. According to PW5 while searching, there was scent of bhang emanating from some sulphate bags therein which heightened their suspicions that there was bhang in the vehicle. The appellant was queried and he denied carrying any bhang in the vehicle. When the incharge Police station Mombo ASP Hatibu Mnandeni (now deceased) was informed on this finding he directed that the vehicle be driven to the police station at Mombo.

On arrival at the police station, darkness was still looming and ASP Mnandemi ordered that the vehicle be under guard until when it alights so that proper search be conducted. This was done from around 7.00am supervised by ASP Mnandemi. Other police officers present included PW1, PW5, WP 3741 DCL Munde Joseph (PW6) and one Daniel. The

appellant and the turnboy were in the vicinity together with Omary Shunda (PW8) who was invited as an independent witness. According to PW1, PW5 and PW6, fourteen (14) sulphate bags suspected to contain bhang were retrieved from the vehicle together with the items which had previously been seen in the vehicle. Thereafter, the said 14 sulphate bags were unloaded from the vehicle and put in a local trolley "mkokoteni" and pulled to Mombo secondary school about 100 metres from the police station to be weighed and were found to weigh 313.5 kgs in total. Thereafter, back at the police station, a certificate of seizure (exhibit P5) was issued and signed by ASP Mwandemi, PW6, PW8, the appellant and the turnboy. The 14 seized bags were reloaded into the vehicle and then subsequently taken to Korogwe Police station.

PW1, ASP Mwandemi, the appellant and the turnboy left with the seized items including the vehicle to Korogwe. According to Selemani Ayoub (PW7) who was called as an independent witness, at Korogwe Police station and Emmanuel Elia Haule (PW4), the 14 sacks were unloaded from the vehicle and witnessed by various police officers, and Lusajo Edward Ndaga (PW3) an officer from the Government Chemist Office, Cpl. Salum who was the exhibit keeper at the station, the appellant and the 2nd accused. Their evidence was that the 14 sulphate

bags were weighed by the Government chemist and the total weight was found to be 313.5 kgs.

Thereafter, samples of the contents from each of the 14 bags were taken by PW3 and put it in a separate envelope, and the envelopes were labelled with the case number. Thereafter, it is alleged the 14 bags were taken to the exhibit room at the police station. The said samples which were taken for purpose of laboratory analysis reached the Government Chemist Office in Dar es Salaam and on the 6th and 7th April, 2014 and found to be bhang. This led to the arraignment of the appellant, the turnboy and one Hussein Bakari Samsimbazi @ Samsimba before the High Court standing charges which we have alluded to hereinbefore.

After a full trial, the appellant was convicted and sentenced to serve life imprisonment while the 2nd accused was acquitted as already stated herein. Dissatisfied with the decision of the trial court, the appellant filed an appeal to this Court. His memorandum of appeal fronted ten grounds of appeal. At the hearing, five grounds of appeal were abandoned that; ground 1, 2, 3, 8 and 9. We find it pertinent to only reproduce the grounds which were argued on behalf of the appellant, thus:

4. *That, the learned trial Judge erred in law and in fact to convict the appellant without considering the proper handling and marking of exhibit P.2 was not done contrary to mandatory procedures laid in P.G.O No. 229.*

5. *That, the learned trial Judge erred in law and in fact by failing to notice that the certificate of seizure (exhibit P.5) was issued un-procedurally as there were no receipts issued by the seizing officers as required by section 38(3) of the Criminal Procedure Act, Cap 20 R.E 2002.*

6. *That, the learned trial Judge erred in law and in fact by acting upon Exhibit P.5 certificate of seizure which its contents were not known to the appellant as the same was not read out after being admitted in Court.*

7. *That, the learned trial Judge erred in law and in fact by failing to notice that the cautioned statement of the appellant (Exhibit P.7) was taken beyond the prescribed time.*

10. *That, the learned trial Judge erred in law and in fact by failing to analyse that the circumstantial evidence adduced by prosecution witnesses had gaps that left doubt to the guilty of the appellant.*

When the appeal was placed before us for hearing, the appellant was represented by Mr. Richard Rweyongeza assisted by Mr. Gideon Opanda both learned Advocates. On the adversary side, the respondent

Republic was represented by Mr. Pius Hilla, learned Senior State Attorney assisted by Mr. Winluck Mangowi, learned State Attorney.

Addressing the Court on the remaining grounds of appeal, Mr. Rweyongeza argued grounds 7 and 10 together, ground 6 separately and grounds 4 and 5 together.

Mr. Rweyongeza started with a general observation and argued that the *mens rea* of the offence was not established and that this was also found by the trial judge as seen in the judgment when he stated; "*the facts in my view negate the knowledge (mens rea) part of the crime*" (page 101 of the record of appeal). The counsel contended that having so observed the trial judge misdirected himself when he proceeded to find that the prosecution proved its case and to convict the appellant.

The counsel then confronted ground 7 and 10 and faulted the trial court for admitting the cautioned statement of the appellant (exhibit P7) despite its finding that it was recorded out of time on the pretext that it was in the public interest. He referred us to the case of **Janta Joseph Komba and 3 Others vs Republic**, Criminal Appeal No. 95 of 2006 (unreported) to bolster his position. The counsel contended that

admissibility of the cautioned statement by the trial court under section 169 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) was against all rules of procedure and in effect this holding by the trial court opened doors for admissibility of illegal exhibits under the guise of public interest forgetting that public interest meant also considering the appellant's interest.

Mr. Rweyongeza contended further that application of section 169 of the CPA under the circumstances was erroneous because the trial court did not address itself to the factors and guidelines outlined in that provision before its application. We were thus invited by the learned counsel to consider the said guidelines and determine whether they were applicable under the circumstances. He challenged the way the trial court applied the provision just because the offence charged involved narcotic drugs arguing that this alone does not justify application of section 169 of the CPA. According to the counsel there have been many cases where the charge is similar and the provision has not been so applied and since no reason was advanced by the trial court to invoke the provision, it was unfounded.

Apart from faulting its admissibility, the learned counsel challenged the weight accorded to the cautioned statement of the appellant arguing that having regard to how it was admitted and the fact that it was retracted, the trial court was required to seek corroboration before relying on it which is contrary to the established practice.

Another concern raised by the learned counsel was the fact that at the time the appellant was put under restraint, he had informed the arresting officers that he was only a driver of the vehicle and that he had no direct access to everything in the vehicle. He also told them that there were people who had supervised the packaging of the items in the vehicle in Arusha and named those people. He implored the Court to consider this argument in the light of the fact that the sacks containing the bhang seized were well hidden and could not be easily seen with a naked eye. Counsel contended further that the appellant was a mere driver who had not seen or was privy to the loading of all the packages in the back of the vehicle, he could not have been aware of the contents of the said packages loaded under supervision of other officers.

With respect to grounds 4 and 5, Mr. Rweyongeza contended that the prosecution failed to prove its case to the standard required having

regard to the contradictions and inconsistencies apparent from the evidence of the prosecution witnesses. On the evidence related to the weighing of the seized sacks containing bhang, the learned counsel argued that the difference in the weight of the same items left doubts on whether what was seized at Mombo was the same with the package that reached the Government chemist for analysis.

The counsel argued further that, another anomaly was that the certificate of seizure (exhibit P5) was not read aloud in court after being admitted and thus it should be expunged from the record. He also challenged the admissibility of the 14 bags of bhang (exhibit P2) stating that no proper foundation was laid prior to being tendered as evidence and thus invited the Court to find the prosecution failed to discharge its duty in proving the case and allow the appeal.

Thereafter, Mr. Opanda took up to amplify on ground 6 and emphasized on the appellant's assertions that the chain of custody for exhibit P2 was compromised. He contended that while there is no dispute on the seizure of 14 bags from a vehicle driven by the appellant, there is no evidence to show how the said exhibit was transferred to Mombo secondary school, in the absence of a paper trail recording who

was the custodian or one in control of the exhibit from the time it was offloaded up to the stage it was taken to Mombo secondary school to weigh the contents. He also contended that there was no register tendered to show the custodian of the exhibit at Korogwe police station and when it was sent to the Chief Government Chemist Office on the 20th of September, 2013.

The only evidence related to the handover of the exhibit, he argued, was that of PW3 (at page 85 of the record) stating that he had handed the said exhibit to PW4 with the view to taking it to the Chief Government Chemist Office in Dar es Salaam. He also alluded to the fact that there was no evidence that exhibit P2 was sealed from the time of seizure to when it was tendered in court and that the seized contents were not connected to the appellant since no receipt was provided in compliance with section 38(3) of the CPA. The other concern on the chain of custody related to unaccounted delays in the report by the Government Chemist (exhibit P4), considering the interval between the receipt of the samples on the 20th September, 2013 and release of the final report in April 2014.

The learned counsel argued that even though admissibility of the report was not objected to, that does not mean that the trial court should not have scrutinized the weight to be accorded to the report in view of the unexplained delay. He contended that the seven (7) months taken to analyze the samples was too long and cited **Marceline Koivogui vs Republic**, Criminal Appeal No. 469 of 2017 (unreported) to reinforce his arguments. For the reasons advanced he prayed that the appeal be allowed.

Mr. Mangowi, learned State Attorney did not resist the appeal. His stance rested on the evidence of chain of custody of exhibit P2. He argued that from the time of seizure at Mombo Police check point and then being sent and left to stay at to police station Mombo, the inspection and offloading of 14 sacks from the vehicle, moving to weigh them at Mombo secondary school up to the time they were sent to OC CID Korogwe, there is no clarity who was in control or the custodian of the exhibit. He asserted that the prosecution witnesses claims that it was the OCS Mombo who was the Incharge, was not supported by any evidence on the modality of such control.

The learned State Attorney argued that the record does not reveal that the OC-CID Korogwe received the exhibits since he was not called as a witness. Again, though the evidence of D6863 D/SSgt Mussa (PW12) who was the investigator was that Cpl. Salum was the custodian of the exhibits at Korogwe and that he took part in its handover, Cpl. Salum was not called as a witness to testify on this neither was the failure to call him as a witness on this crucial aspect disclosed. There is also evidence from PW12 that when the exhibit reached Tanga the keys to the exhibit were handed over to OC CID Chumbageni Police station but he was also not called to testify on the safe keeping of the exhibit. All these scenarios he argued, point out to a break in the chain of custody from the time of seizure up to the time the exhibit was tendered at the trial. The learned State Attorney thus argued that having regard to the doubts observed in the prosecution case, the appeal was meritorious.

Having considered the grounds of appeal, the submissions from counsel for both sides and the cited authorities we are of the view that the main issues for determination of this appeal are mainly; **one**, propriety of admissibility and weight to be accorded to the cautioned statement of the appellant relied upon by the trial court to convict him

(ground 7); **two**, whether or not the chain of custody of exhibit P2 and exhibit P4 were intact from the time of seizure to the time they were tendered in court (grounds 4, 5 and 6) and **three,** whether or not the prosecution proved its case to the standard required (ground 10).

On issue number one, there is no doubt that the trial court relied on the cautioned statement of the appellant (exhibit P7) to convict the appellant and stated:

> "... *In Court, the statement was admitted in evidence upon the Court being satisfied that it was voluntarily made after it had conducted a trial within trial to establish whether or not the same was voluntarily made. Going by it, it is my view that the statement in question is self-explanatory. It clearly shows that he first accused did knowingly transport bhang, the subject matter of this case.... In that premise of the matter, the court is of the view that the first accused knew that he was trafficking in narcotic drugs, namely bhang, hence the mens rea element of the crime the accused persons stand charged with is proved as against the first accused person".*

Suffice to say, this holding did not in any way consider the fact that the predecessor Judge who had presided over the trial within a trial

after hearing arguments on the objection to the admissibility of the confessional statement stated that:

> *"... Since it is clear that such extension was not sought and obtained, I find that the cautioned statement was illegally obtained after the expiry of the basic period of four hours within which the accused ought to have been interviewed. The first accused person along with the second accused person were arrested on 12/09/2017 at the checkpoint at 0430 hrs. As earlier said, time started to run when they reached Mombo Police Station at 0600 hrs. The first accused person's cautioned statement was taken from 11.42 hrs to 12.48 hrs. It was about 7 hrs after their arrival at the station whilst under restraint".*

Despite the above finding, the learned trial Judge admitted the confessional statement relying on the case of **Ibrahim Yusuph Calist @Bonge and others vs Republic**, Criminal Appeal No. 204 of 2011 (unreported) having observed at page 405 of the record as follows:

> *"The court agreed that the discretion of the High Court to admit caution statement on the basis of human dignity by virtue of section 169 of the CPA was proper. In a similar vein, and considering the circumstances of this case and for reason that will feature in my judgment and which I am now reserving, I am of a view that it would be prudent*

to exercise this discretion under section 169 of the CPA based on public interests. I am also of the view that no rights and freedom of any persons including the accused persons has been prejudiced."

The law is well settled on admissibility of a confessional statement of an accused person where it was taken beyond the time prescribed by the law. We find it pertinent to reproduce the relevant provisions on this issue.

"50(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is:-

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains

from interviewing the person, or causing the person to do any act connected with the investigation of the offence

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of-

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer.

51.-(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may—

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period.

(2) ... N/A

(3) ....N/A"

As submitted by the learned counsel for the appellant and supported by the learned Senior State Attorney, in the instant appeal, there is no dispute that the cautioned statement of the first appellant was taken beyond the prescribed time. As found by the trial judge, it was taken after seven hours instead of the four hours prescribed by the law. There was also no extension granted as required by the law. There are numerous decisions of this Court stating that once this is the case, the statement should be expunged.

In the case of **Emanuel Malabya vs Republic**, Criminal Appeal No. 212 of 2004 (unreported), this Court reiterated the requirement to observe the law while recording statements of suspects when it stated thus:

> "*The violation of section 50 is fatal and we are of the opinion that section 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as mere technicalities. We therefore expunge exhibit PI.*"

Again, in **Lumuda Mahushi vs Republic**, Criminal 29 Appeal No. 239 of 2011 and **Joseph Mkumbwa and Another vs Republic**, Criminal Appeal No. 9 of 2007, **Emilia Aidan Fungo@ Alex and another vs Republic**, Criminal Appeal No. 278 of 2008 and **Hamisi Juma@ Nyambanga and another vs Republic,** Criminal Appeal No. 126 of 2011 (all unreported)). The Court proceeded to expunge the statements from the record.

Before we take the course of action taken by the above decisions of this Court, we are mindful of the fact that the trial court relied on section 169 of the CPA to admit the confessional statement of the appellant despite it being recorded beyond the prescribed time on

account of public interest. Section 169 of the CPA which addresses admissibility of illegally obtained evidence states:-

"169.-(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence, it is satisfied as required by subsection (1) include—

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

(b) the nature and seriousness of the contravention or failure;

(c) the extent to which the evidence that was obtained in contravention of in consequence of the

contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained; and

(d) all the circumstances of the offence, including the circumstances in which the evidence was obtained.

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(4) The court shall, prior to exclusion of any evidence in accordance with subsection (1), be satisfied that the failure or breach was significant and substantial and that its exclusion is necessary for the fairness of the proceedings.

(5) Where the court excludes evidence on the basis of this provision it shall explain the reasons for such decision.

(6) This section is in addition to, and not in derogation of, any other law or rule under which a court may refuse to admit evidence in proceedings".

As rightly pointed out by the learned counsel for the appellant, the trial judge invoked the provision despite the fact that neither did the

prosecution establish the conditions precedent as set out in the provision nor show how the admission of the appellant's confessional statement would be in the public interest without prejudicing the rights and freedoms of the appellant. As pointed out by the appellant's counsel, the interests of the appellant had to be considered too.

An examination of section 169 of CPA also infers that the conditions therein found in subsection (2) have to be fulfilled conjunctively as held by the Court in **Jibril Okash Ahmed vs Republic**, Criminal Appeal No. 331 of 2017 (unreported) where we stated:

> *"We need not overemphasize that the conditions stipulated under section 169(2) provide for the scope within which the judge is to exercise his discretion. Definitely, the way that section is couched suggests that those conditions should not only be conjunctively complied with but are also not exhaustive. That is clear from the words "the matters that the court may have regard to in deciding....include..."*

We find the argument that since the case involved narcotic drugs brought into play invocation of this provision on ground of public interest does not hold water especially where the prescribed conditions have not been fulfilled. We are thus of firm view that had the trial Judge

considered the foregoing, he would not have accorded any weight to exhibit P7 especially after finding that it was recorded beyond the prescribed time and thus contravening section 50(2) of the CPA. Accordingly, this ground has merit. Since such non-compliance vitiated the confessional statement of the appellant, we are left with no other option but to expunge it from the record.

With regard to issue two, the learned State Attorney conceded to the fact that the chain of custody for exhibit P2 and the contents narrated in exhibit P4 (the retrieved samples from the 14 sacks) were compromised as submitted by the counsel for the appellant. Mindful of the fact that the learned trial Judge did not specifically refer to the stages in the chain of custody, his analysis of evidence from time of seizure, weighing of exhibits at Mombo, its transfer to Korogwe, taking samples and issuance of exhibit P4 and related processes up to being tendered and admitted in the trial court was in essence consideration of the chain of custody of the exhibits and the finding that it was not broken. This led the trial Judge to conclude that the *acteus reus* was established and thus finding the appellant guilty as charged followed by conviction and sentence.

We are aware of numerous decisions of this Court which have put in place guidelines and factors for consideration where chain of custody of an exhibit is under scrutiny. These decisions include; **Paulo Maduka and 3 Others vs Republic**, Criminal Appeal, No. 110 of 2007, **Abuhi Omari Abdailah and 3 Others vs Republic**, Criminal Appeal No. 28 of 2010 and **Zainab Nassor @Zena vs Republic**, Criminal Appeal No. 348 of 2015 (all unreported). The guidelines were further restated in **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017, **Alberto Mendes vs Republic**, Criminal Appeal No. 473 of 2017, **Marceline Koivogui vs Republic**, Criminal Appeal No. 469 of 2017 and **Chacha Jeremiah Murimi and 3 Others vs Republic**, Criminal Appeal No. 551 of 2015 (all unreported).

While it is settled law that chain of custody shall be proved by way of trail of documentation as stated in **Paulo Maduka and Others vs. R** (supra) this shall not be the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances in each particular case. In cases where the relevant exhibit can neither change hands easily nor be easily compromised then principles as laid down in the case of **Paulo Maduka** (supra) can be relaxed.

In the present case, there is no doubt as rightly submitted by the learned counsel for the appellant and in essence conceded by the learned State Attorney that on 12/09/2013 at 5.00hrs, a vehicle Isuzu PSR with Reg. No. T. 788 driven by the appellant was stopped and upon inspection about 14 sacks suspected to contain bhang were seized at Mombo police check point. That, the said vehicle with its package was taken to Korogwe, where samples were taken from the packages and allegedly taken to Dar es Salaam for analysis.

In terms of the paper trail, with respect to exhibit P2 it was only the certificate of seizure (exhibit P5) which was tendered to support the trail from time the exhibit was seized. We are mindful that admissibility of this exhibit was resisted by the defence and the trial Judge overruled the objection but we are satisfied that there was not much to fault the exhibit itself. This is because there is nothing in the evidence of PW1, PW5, PW6 and PW8 to clearly show who was really in charge of exhibit P2 from the time the vehicle was stopped and parked at the police station Mombo, or when, the packages were taken to the secondary school for weighting and leaving for Korogwe. As rightly submitted by the learned State Attorney there is no evidence to show how and when the exhibit was handed over to the Incharge Mombo police station. The

evidence presented in court is only that the Incharge Mombo Police station was in control of the exhibits without showing how, since there were no documents tendered on this to support this assertion. It is also unfortunate that he was unable to testify in court on this because information is that he died before being called to testify. The trial court was not even availed with the Occurrence Book which PW1 stated was the document where they recorded the exhibits when were parked at Mombo police station. There was also no evidence adduced of the exhibits having been sealed at Mombo. As pointed out by the learned counsel for the appellant this leaves doubts on whether the exhibits were not interfered with.

With regard to oral evidence supporting the chain of custody, there was no evidence of any exhibit keeper who testified on its storage. At Mombo, the person who was said to have control of the bags as already stated herein is dead and did not testify. At Korogwe, Cpl. Salum who is said to have been the exhibit keeper and in control of the exhibit did not testify. We are aware of the efforts done by the prosecution to procure him as a witness to testify in the trial. The record reveal that the prosecution filed a notice to call him as an additional witness since neither his statement or the substance of his evidence were availed

during committal proceedings. The trial court denied the application by the prosecution, who then filed an appeal but which they later withdrew. Despite this, it is clear that it is the prosecution which in the end decided not to proceed and do the needful to ensure he testifies. His absence as rightly stated by the learned State Attorney created a hole in the prosecution witness in proving the chain of custody of exhibit P2. Failure to call him adversely impacted the case for the prosecution as conceded by the learned State Attorney.

There was also no evidence on how exhibit P4 reached Tanga, and where it was stored after Korogwe before it was tendered in the trial court. We agree with the learned State Attorney's argument that the evidence of PW12 relating to how the exhibit reached Tanga leaves doubts since he only stated that when the exhibit reached Tanga the keys to the exhibit were handed over to OC CID Chumbageni Police station and nothing further on who was the exhibit keeper nor provided evidence on handover of the said exhibit and thus leaving questions why he was not called to testify on where the exhibit was kept and who was in control of them.

With respect to the samples taken, the relevant exhibit is P3, where it was recorded how the samples were taken and by whom. The evidence is that PW2 was handed the samples for analysis by PW4, on 24th September, 2013 which is also acknowledged by PW2. Unfortunately, there was no evidence to account for what caused the delay to analyze the exhibits. Since it was not disputed that the analysis of the samples took place on the 6th and 7th April 2014 more than seven months after PW2 was handed over. The delay was not accounted for which left us with doubts in our mind on whether what was analyzed was what was seized at Mombo. Taking the foregoing into consideration we have no reservation to agree with the appellant's counsel and the learned State Attorney that the chain of custody of the samples taken for analysis and the 14 sacks of bhang, found with the appellant was cracked. For the foregoing, this ground has merit.

Lastly, on whether the prosecution proved its case beyond reasonable doubt, which we have to answer in the aftermath. **Firstly**, exhibit P5 which the learned trial judge relied on to find that the appellant had knowledge of what was in the vehicle has been expunged. It is no longer part of evidence. **Secondly,** we have found that the chain of custody of the exhibits was not intact. We are thus left with no

cogent evidence to find that the charges were proved against the appellant to the standard required in criminal cases.

For the above reasons, we hold that the appeal is merited and we allow it. In consequence, we quash and set aside the conviction and sentence. The appellant shall be released from custody forthwith unless otherwise lawfully held.

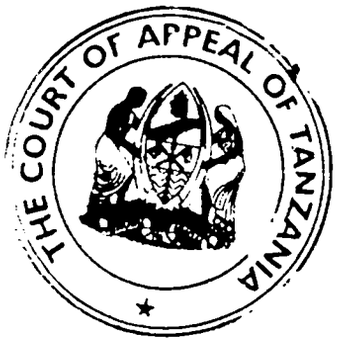
DATED at **TANGA** this 5th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 7th day of June, 2021 in the presence of Mr. Ahmed Makalo Holding brief for Mr. Richard Rweyongeza and Gideon Opanda, learned Advocates for the appellant and Mr. Joseph Makene, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL